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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 125

WILLIAM EDWARD WOODS, *Petitioner*,

v.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Subject Index.

Page

Petition for Writ of Certiorari:

I. Jurisdiction 2

II. Statutes Involved 17

III. Questions Presented 18

IV. Summary Statement of the Matters Involved... 20

V. Reasons for Allowance of Writ 24

VI. Prayer 27

Brief in Support of Petition 29

1. Opinion Below 29

2. Jurisdiction 29

3. Statement of the Case 32

4. Specifications of Error 34

5. Argument 35

Summary 35

I. The adjudication by the highest courts of Illinois that the Boiler Inspection Act cannot be made the basis of an action by petitioner is final and is subject to review on statutory certiorari by this court 36

II. The adjudication by the highest courts of Illinois on the questions which have arisen in this action under both the Federal Boiler Inspection Act and the Federal Safety Appliance Act and the constitutional and statutory questions as to petitioner's right to a trial by jury and to the jury's proper determination of the federal questions, is arbitrary and capricious, and constitutes an abuse of the judicial power of the state and is subject to review at this time by this court in the exercise of its inherent jurisdiction pursuant to Section 1651(a), Title 28, United States Code 39

Page

III. The Appellate Court grossly erred in misconceiving and failing properly to apply the Boiler Inspection Act .....

IV. The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Safety Appliance Act

V. The petitioner is irreparably prejudiced and damaged by the decision of the Appellate Court and the refusal of the Illinois Supreme Court to correct it

VI. The petitioner has been wrongfully deprived of his right to trial by jury guaranteed to him by the 7th Amendment of the Constitution of the United States, and Article II, Sec. 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Article II, Sec. 19 of the Constitution of the State of Illinois..

Petitioner incorporates herein pp. 29 to 51 inclusive, of its brief filed in cause No. 738

TABLE OF CASES.

Affolder v. New York C. & St. L. R. Co., 70 S. Ct. 509 (1950) 26, 38
Allen v. United States Fidelity & Guaranty Co., 269 Ill. 234 26
Anderson v. Baltimore & O. R. Co., 2d Cir. 1937, 89 F. 2d 629 cert. denied 302 U. S. 696..... 26
Anderson v. Chesapeake & O. R. Co., 352 Ill. 561, cert. denied 290 U. S. 675 26
Bailey v. Central Vermont Ry., 319 U. S. 350.....25, 31, 40
Bolan v. Lehigh Valley R. Co., 2d Cir. 1948, 167 F. (2d) 934 24
Brady v. Southern Ry. Co., 320 U. S. 476.....25, 31, 40
Brown v. Western Railway of Alabama, 338 U. S. 294 17, 25, 26, 30, 40
Burket v. Reliance Bank & Trust Co., 367 Ill. 196.... 30

Page

Chesapeake & Ohio v. Mihas, 280 U. S. 102 16
Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U. S. 44 16
Clark v. Hansen, 320 Ill. 480 30
Cohen v. Beneficial Industrial Loan Corporation, 337 U. S. 541 ....17, 38
Corcoran v. City of Chicago, 373 Ill. 567 8
C. R. I. & P. Ry. Co. v. People, 217 Ill. 164 31
Cuneo v. City of Chicago, 272 Ill. 473 .....11, 30
Cusson v. Canadian Pac. Ry. Co., 2d Cir. 1940, 115 F. (2d) 430 26
Dedinger v. Pacific R. Co., 6th Cir. 1930, 39 F. (2d) 798 26
Dinoffria v. Brotherhood of Teamsters, 399 Ill. 304 ..11, 30
Eker v. Pettibone, 7th Cir. 1940, 110 F. (2d) 451 26
Ex Parte Republic of Peru, 318 U. S. 578 .....17, 30
Ex Parte United States, 287 U. S. 129 17
Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589 26
Geiger v. Merle, 360 Ill. 497 31
Goodrich v. Sprague, 376 Ill. 80 30
Gospel Army v. City of Los Angeles, 331 U. S. 543 17, 32, 38
Hines v. Smith, 275 Fed. 766 24
House v. Mayo, 324 U. S. 42 .....17, 30
Kluska v. City of Chicago, 97 Ill. App. 665 26
Lavender v. Kurn, 327 U. S. 645 26
Lilly v. Grand Trunk Western Ry. Co., 317 U. S. 481 24
Louisville & N. R. Co. v. Botts, 8th Cir. 1949, 173 F. (2d) 164 24
Mabee v. Sutliff & Case Co., 404 Ill. 27 8
Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock, 279 U. S. 140 16
Mirich v. Forchner, 312 Ill. 343 30
Myers v. Reading Co., 331 U. S. 477 26
Newberry Library v. Board of Education, 387 Ill. 85 (1944) 8, 38
Oscanyon v. Arms Co., 103 U. S. 261 26
Osgood v. Skinner, 211 Ill. 229 6
Pennsylvania R. R. Co. v. Auchenbuch, 3rd Cir. 1926, 16 F. (2d) 550 26
People v. Botulinski, 392 Ill. 212 6
People v. Kelley, 367 Ill. 616 31
People v. Masoro, 301 Ill. 370 6

Page

Peterson v. General Rug & Carpet Cleaners, 333 Ill. App. 47 26
Price v. Johnston, 334 U. S. 266.....17, 38
Radio Station W O W v. Johnson, 326 U. S. 126..... 17
Republic Natural Gas Co. v. State of Oklahoma, 334 U. S. 62 .....17, 38
Rescue Army v. Municipal Court, 331 U. S. 549.....17, 38
Roche v. Evaporated Milk Ass'n, 319 U. S. 21..... 17
Roddy v. Armitage Hamlin Corporation, Inc., 401 Ill. 605 (1949) 8, 9, 37
Scott v. Freeport Motor Casualty Co., 379 Ill. 155..... 30
Sixby v. Chicago City Ry. Co., 260 Ill. 478 30
Siegel v. Chicago City Ry. Co., 325 Ill. 43..... 30
Shaw v. Courtney, 385 Ill. 559 8
Southern Ry. Co. v. Lunsford, 297 U. S. 398 24
Spencer v. Chicago City Ry. Co., 366 Ill. 120..... 30
Spotts v. Baltimore & Ohio R. Co., 7th Cir. 1938, 102 F. (2d) 160 26
Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574..... 24
United States Alkali Export Ass'n v. United States, 325 U. S. 196 .....17, 30
Urie v. Thompson, 337 U. S. 163.....17, 25, 30, 39, 40
Wilkerson v. McCarthy, 336 U. S. 53 .....25, 31, 40
Williams v. New York Central R. Co., 402 Ill. 494....26, 30
Woods v. New York, Chicago & St. Louis R. Co., 339 Ill. App. 132 .....3, 26, 29
Young v. Ragen, 337 U. S. 235 .....17, 38

CONSTITUTIONAL CITATIONS.

U. S. Constitution, Article III, Sections 1 and 2..... 30
United States Constitution, Seventh and Fourteenth Amendments 11, 12, 13, 14, 25, 30
Illinois Constitution, Article VI, Sec. 11.....11, 30
Illinois Constitution, Article II, Section 5..11, 12, 13, 14, 30
Illinois Constitution, Article II, Section 19....11, 12, 13, 14

STATUTES CITED.

Federal Employers' Liability Act, 45 U. S. C., § 51-60, Acts of April 22, 1908, c. 149, 35 Stat. 65; August 11, 1939, c. 685, 53 Stat. 1404.....2, 3, 8, 17, 20, 29, 30, 36, 38, 42

Page

Federal Boiler Inspection Act, 45 U. S. C. § 23; Acts of Feb. 17, 1911, c. 103, 36 Stat. 913; March 4, 1915, c. 169, 38 Stat. 1192; June 7, 1924, c. 355, 43 Stat. 659 ..... 2, 3, 5, 7, 8, 11, 12, 15, 17, 18, 19, 20, 23-24, 29, 35, 36, 37, 38, 39, 42-43
Federal Safety Appliance Acts, 45 U. S. C. § 11; Act of April 14, 1910, c. 160, 36 Stat. 298 ..... 2, 3, 7, 8, 13, 14, 15, 16, 17, 19, 20, 21, 24, 26, 29, 35, 37, 39, 40, 41, 43
Title 28, United States Code, § 1257(3) 2, 9, 17, 30, 31, 35
Title 28, United States Code, § 1651 .. 2, 17, 29, 30, 35, 39, 40
Illinois Civil Practice Act, § 75, Smith-Hurd Illinois Annotated Statutes Ch. 110, § 199 8

RULES OF INTERSTATE COMMERCE COMMISSION.

Rule 101, C. F. R. Title 49, Parts 1-91, Sec. 91.101 .. 18, 24, 43
Rule 129, C. F. R. Title 49, Parts 1-91, Sec. 91.129 .... 6, 18, 24, 42-43
Rule 131, C. F. R. Title 49, Parts 1-91, Sec. 91.139 .... 6, 18, 24, 44

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No. ———

WILLIAM EDWARD WOODS, *Petitioner,*

v.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT.

To the Honorable, The Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States.

Your petitioner, WILLIAM EDWARD WOODS, prays that a Writ of Certiorari issue to review the final judgment and order of the Supreme Court of Illinois entered on March 14, 1950 (E. R. 319-320) in said Court in case No.

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* References (R.) are to the transcript of record on the leave to appeal proceeding, bound in the customary brown binding, except where otherwise indicated by (E. R.) in which instances the references are to the transcript of record, bound in gray, on the writ of error proceeding.

31428, entitled *William Edward Woods, Plaintiff-in-Error* v. *The New York, Chicago and St. Louis Railroad Company, a corporation, Defendant-in-Error,* dismissing writ of error to the Appellate Court of Illinois of the First District sued out of the Supreme Court of Illinois, by your petitioner on December 31, 1949; and to review the order (R. 357) of the Supreme Court of Illinois, entered March 16, 1950 (R. 357) in said Court in case No. 31429, entitled, *William Edward Woods, Petitioner,* v. *The New York, Chicago and St. Louis Railroad Company, a corporation, Respondent,* dismissing your petitioner's petition to the Supreme Court of Illinois (R. 1-42) for leave to appeal from the judgment (E. R. 271-2; R. 318-9) of the Appellate Court of Illinois for the First District, entered November 21, 1949, reversing the judgment (E. R. 264-5, R. 311-2) of the Superior Court of Cook County, Illinois, in a cause entitled, *William Edward Woods, Plaintiff,* v. *The New York, Chicago and St. Louis Railroad Company, a corporation,* No. 47-S-1155, entered May 7, 1948 for the sum of $40,000.00 in favor of petitioner against the respondent on the verdict of the jury in an action brought under the Federal Employers' Liability Act (45 U. S. C. Secs. 51 et seq.), the Federal Boiler Inspection Act (45 U. S. C. Sec. 23), and the Federal Safety Appliance Act (45 U. S. C. Sec. 11); and to review the said judgment of the Appellate Court of Illinois for the First District, as may be the appropriate remedy in the circumstances of this action.

I.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1651(a) and 1257(3).

A fundamental principle embodied in the Federal Boiler Inspection Act, underlying its prime and most important objective and presenting federal questions of substance, has been finally decided in this cause by a state court of

last resort in a way clearly not in accord with applicable decisions of this Court. This flagrantly erroneous ruling has been broadcast to the state and nation under Rule 36 of the Rules of the Appellate Court of Illinois for the First District, which provides that that Court "shall designate for publication in full in Appellate Court Reports, only such written decisions of such court as contain a discussion of a new or doubtful question of law, or involve the application of rules of law to a novel state of fact, * * *" The Appellate Court has so designated its opinion in this case, and the opinion, which is bound to bring about much abortive litigation, is officially reported in *Woods* v. *New York, Chicago & St. Louis R. Co.,* 339 Ill. App. 132. The Supreme Court of Illinois has refused to expunge, review or reverse the ruling of the Appellate Court, although petitioner, in order to protect his constitutional and federally created statutory rights, has exhausted every proper remedy in the state courts of Illinois in seeking vindication and enforcement thereof.

This case offers an exceptional opportunity for this Court to implement its announced policy that the federally created rights and duties involved in this important type of litigation must be uniformly administered throughout the nation in all courts, state as well as federal.

This action arises and was determined under the provisions of the Federal Employers' Liability Act (45 U. S. C. Secs. 51 et seq.), the Federal Boiler Inspection Act (45 U. S. C. Sec. 23), and the Federal Safety Appliance Act (45 U. S. C. Sec. 11).

The respondent not only admits its liability under the Federal Employers' Liability Act, as stated in the opinion of the Appellate Court (R. 38), but in the trial court it also admitted and expressly refrained from contesting its liability under the Safety Appliance Act (R. 55-7, 73, 84, 260-5).

The undisputed evidence, notwithstanding the cavalier and inaccurate "brushed off" (R. 38) statement of facts

contained in the Appellate Court's opinion, established, or at least the jury was fully warranted in finding, the following facts:

At about ten minutes before midnight on November 14, 1946 (R. 65, 249), in respondent's dark, unlit Fort Wayne railroad yard (R. 66, 250), petitioner, in the proper performance of his duties as a brakeman on respondent's interstate freight train (R. 70), was caught between the side of the locomotive tender on which he was riding as it proceeded backward on a main track at a speed of five to eight miles an hour (R. 70, 190, 197), and the side of a coal car standing on a spur track admittedly too close to and fouling the main track, and was crushed as he was rolled for a distance of five to ten feet or more, in the narrow space three or six to not more than ten inches wide, between the side of the tender and the side of the coal car. (R. 63-74, 180, 189, 250).

The tender was equipped with a fixed-focus back-up or rear headlight (R. 178, 190, 214-5), which petitioner testified was dim and out of focus and looked like it had been smashed and the reflector was off, and threw the rays of its 100 watt bulb up in the air at an angle of about 45 degrees, instead of down along the track, as intended and designed. Petitioner testified (and in some aspects, he was corroborated rather than contradicted by respondent's witnesses) that there was no light along the tracks for a distance of 50 or 75 feet immediately in back of the tender, leaving that area in complete darkness, although the reflection of the light was sufficient to enable one to see an object as big as a box car in the further distance. (R. 66, 67, 93)

The main track was straight until just about the place where the spur track branched off to the southwest, at which place the main track curved toward the northwest, the effect being that while the locomotive and tender approached the scene of the accident on the straight track, the coal car was straight ahead and its juxtaposition to the main track was not discernible because of the defective condition of the rear

light, until the tender and locomotive had negotiated the curve to some extent. By that time the coal car was in the area of darkness. (R. 44, 175, 177)

Petitioner testified that, although he was watching in the direction in which the locomotive and tender were backing because the exact location of the freight train to which they were to couple was unknown, he could not and did not see the fouling coal car until it loomed faintly out of the darkness only ten or twelve feet away. Fearing that he might be thrown under the wheels of the moving engine if he attempted to get off, he endeavored to get around the corner of the tender to avoid being crushed to death, but before he could get to a place of safety, he was caught and injured as before stated. (R. 70, 71, 91)

The jury was instructed that under the Federal Boiler Inspection Act it was the respondent's duty to furnish a locomotive, its boiler, tender and all parts and appurtenances thereof, in proper condition and safe to operate in the service to which the same are put and that may be operated in active service without unnecessary peril to life or limb, and that if the jury should find from the greater weight of the evidence that respondent failed to equip its locomotive and tender with an efficient and properly focused light and to equip such locomotive and tender with such a light caused, or proximately contributed to cause, unnecessary peril to life or limb of petitioner and made the locomotive unsafe to operate in the service to which the locomotive and tender were put, it might then find that the respondent had violated the Federal Boiler Inspection Act, and that if it should further find that the furnishing of such a locomotive and tender with a light that was dim and out of focus directly and proximately caused injuries to be sustained by petitioner, then, even though the jury might find from the greater weight or the preponderance of the evidence that petitioner was guilty of contributory negligence, the Federal Boiler Inspection Act denies to respondent the defense of contributory negligence on the part of petitioner, and

such contributory negligence, if any, would not act as a bar or diminish the right of petitioner to recover full damages for such injuries, if any, he has sustained. (R. 253-254)

The respondent did not tender any request for any instruction to the effect that damages should be diminished by the jury in proportion to the amount of negligence attributable to petitioner if the jury found that petitioner was guilty of any contributory negligence. Under Illinois practice the only duty of the Court is to give or refuse such instructions as are asked by the parties, and it is not the duty of the court to prepare or give instructions on its own motion, and error cannot be predicated on a proposition of law as to which no instruction has been requested by the complaining party. *Osgood* v. *Skinner*, 211 Ill. 229; *People* v. *Masoro*, 301 Ill. 370; *The People* v. *Botulinski*, 392 Ill. 212.

Nevertheless, the Appellate Court, although according to its opinion

> "an issue of fact to be determined by the jury was created if this alleged defect in the light can be made the basis of an action under the Boiler Inspection Act (R. 41),"

held that neither Rule 129 nor Rule 131 of the Interstate Commerce Commission required any rear light because at the time of injury the locomotive was in road service, and was backing to couple to its train and move it to Bellevue, Ohio, stating:

> "Its movements were within the exception stated in Rule 129 (b), supra, and no headlight was required. Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused. No claim can be made that the projection of the rays of this light into the air created an 'unnecessary peril to life or limb' in the operation of the engine (R. 42)."

The Appellate Court therefore held that it was error requiring a reversal of the judgment to instruct the jury that the plaintiff was entitled to full damages if the jury found

that the defective condition of the headlight contributed to cause petitioner's injuries (R. 42, Instruction 6, R. 253-4).

The Appellate Court also held that it was reversible error similarly to instruct the jury that there could be no deduction of damages on account of contributory negligence on the part of plaintiff, if the jury found that the fouling coal-car was equipped with an inefficient hand brake which permitted it to drift from the safe position it occupied when a regular yard brakeman was seen setting the brake on it about three hours before the accident, to the fouling position, although that issue was not contested, but was, in effect, admitted by the respondent at the trial, and in any case was proved by amply sufficient evidence. (R. 38-42, 55-7, 71-4, 254-5)

The Appellate Court remanded the cause for further proceedings in accordance with its opinion, the effect being that petitioner has finally and irrevocably been deprived of the benefits of the Boiler Inspection Act, and has also been deprived of the benefits of the Safety Appliance Act, notwithstanding the admission by respondent and the uncontested proof of its violation of that Act.

Under the law of Illinois, the right of petitioner to recover under the Boiler Inspection Act is forever foreclosed. The adjudication on that legal issue is not subject to further review by any state court. No amount or character of other, different or additional evidence on any new trial can alter the basis or change the result of the Appellate Court's decision with respect to petitioner's right to the benefit of the Boiler Inspection Act. It was stipulated, and it was the fact (R. 170) that at the time plaintiff was injured, he (necessarily including the locomotive)

> "was on his way to couple onto a train, or part of a train, standing in the yard of the defendant"

and it is beyond dispute that the train was to proceed from Fort Wayne, Indiana to Bellevue, Ohio.

Of course, in Illinois, as elsewhere, the trial court is bound to conform to the Appellate Court's opinion on remand for

a new trial. With certain exceptions not applicable here, the judgments and decrees of the Appellate Court of Illinois are final (Illinois Civil Practice Act § 75, Smith-Hurd Illinois Annotated Statutes Ch. 110 § 199). *Corcoran* v. *City of Chicago*, 373 Ill. 567; *Shaw* v. *Courtney*, 385 Ill. 559; *Mabee* v. *Sutliff & Case Co.*, 404 Ill. 27.

The complaint in this action alleges, and the facts warrant, three distinct rights of recovery, with potentially (even if unlikely) different measures of damages:

(1) A conceded and admitted right of recovery under the Federal Employers' Liability Act, based on admitted and proven gross and multiple negligence of the respondent, subject to diminution of the damages in the proportion to the amount of negligence, if any, attributable to petitioner;

(2) A right of recovery under the Federal Boiler Inspection Act, where negligence, either of petitioner or respondent, is not an element, and full damages are recoverable; and

(3) A right of recovery under the Federal Safety Appliance Act, which was admitted, and proved expressly without objection, at the trial, where questions of negligence and contributory negligence likewise do not affect the measure of damages, which are recoverable in full.

The Supreme Court of Illinois has held in recent cases, *Newberry Library* v. *Board of Education*, 387 Ill. 85 (1944) and *Roddy* v. *Armitage Hamlin Corporation, Inc.*, 401 Ill. 605 (1949), that where two separate rights, although directed to the same end, are asserted and one is finally disposed of, while the other remains pending, the order disposing of the one is a final order within the purview of Illinois appellate procedure and is reviewable by the Illinois Supreme Court on leave granted by the Appellate or Supreme Court which is necessary in all cases of appeal to the Illinois Supreme Court, except in certain specified cases

not pertinent here. But in the case at bar, which to all practical intents and purposes is similar to the Illinois cases cited above, and to others referred to therein, leave to appeal has been denied by both the Appellate Court and, in effect, by the Illinois Supreme Court.

The judgment and opinion of the Appellate Court, and the refusal of the Illinois Supreme Court to review them, foreclose for all time petitioner's right of recovery under the Boiler Inspection Act and constitute the finality with respect to petitioner's right of recovery under that Act which enables this Court to take jurisdiction under the provisions of Title 28, United States Code, Section 1257(3). *Roddy* v. *Armitage Hamlin Corp., supra* and cases cited therein.

Under the familiar principles which this Court has always applied where jurisdictional basis exists as to any one branch of a case, it can decide all other federal questions presented by the record, including the question whether the evidence and proceedings at the trial warranted the instruction to the jury that petitioner was entitled to full damages, if the jury found that a violation of the hand-brake provision of the Federal Safety Appliance Act contributed to his injuries.

This petition relates to the same action as that involved in cause No. 738, October Term, 1949, in this Court, entitled, *The People of the State of Illinois on Relation of William Edward Woods, Petitioner,* v. *John M. Touhy, Presiding Justice, Grover C. Niemeyer and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents.*

That is an original action in the Supreme Court of Illinois for leave to file a petition for a peremptory writ of mandamus directing the judges of the Appellate Court to expunge the judgment entered by them reversing the judgment of the Superior Court of Cook County in favor of petitioner and to affirm the Superior Court judgment.

There can be no question, and the respondents, appearing by the same attorneys who represented the railroad

company in the appellate court, do not question, that the order of the Illinois Supreme Court dismissing the petitioner's petition for leave to file the application for a writ of mandamus is a final order, and that important federal questions subject to review on certiorari by this Court are presented, unless such review is interdicted because the dismissal of the petition for mandamus rested exclusively on nonfederal grounds, a proposition answered in petitioner's reply brief in cause No. 738.

Your petitioner, on page 6 of the petition in cause No. 738, requested that decision thereon be deferred and considered with the applications contained herein, unless this Court should be willing to and could on the petition in cause No. 738, order certified to it one or both of the records presented with this petition, which contain all of the proceedings had in all of the courts below, and the consideration of cause No. 738 has been deferred and will be considered by this Court concurrently with this petition in accordance with petitioner's motion to that effect, filed May 18, 1950.

In order to protect petitioner's constitutional and federally created statutory rights and to exhaust every proper remedy in the state courts of Illinois in seeking vindication and enforcement thereof, which have been irrevocably violated by said courts, unless this Court intervenes and corrects the grave errors into which they have fallen, it was deemed advisable and necessary to, and your petitioner did, on December 31, 1949, file in the Illinois Supreme Court three separate proceedings:

> (1) The mandamus proceeding, which is the subject of the petition in cause No. 738 in this Court; and
>
> (2) The petition to the Illinois Supreme Court for leave to appeal, and (3) The praecipe for Writ of Error, which are the subjects of this petition.

Under Illinois appellate practice, jurisdiction of the Illinois Supreme Court to review on writ of error a constitu-

tional question derives directly from the Constitution of the State (Illinois Constitution, Art. VI, Sec. 11) and is not affected by any statutory limitation limiting the jurisdiction of that Court with respect to finality of the judgment to be reviewed, and where the constitutional question first arises when the judgment of the Appellate Court is entered, the right of the Illinois Supreme Court to review such question by writ of error is well settled, even though such constitutional questions were not raised in the Appellate Court. *Dinoffria* v. *Brotherhood of Teamsters,* 399 Ill. 304, pp. 306-7, cert. denied 335 U. S. 815; *Cuneo* v. *City of Chicago,* 272 Ill. 473, among many others cited in the annexed brief. The decision of such constitutional questions by the Illinois Supreme Court is necessarily final.

On the writ of error, petitioner assigned the following errors and reasserts them here:

1. The judgment of the Court of Appeals of Illinois for the First District denies to petitioner the right to a trial by jury of the issues of fact as to whether the locomotive, its tender, parts and appurtenances, including the rear light on the tender, were in proper condition and safe to operate in the service to which they were put without unnecessary peril to life or limb as required by the provisions of the Federal Boiler Inspection Act (45 U. S. C. Sec. 23; 36 Stat. 913; 38 Stat. 1192; 43 Stat. 629) and as to whether the injuries sustained by petitioner were caused or contributed to by the unlawful use by the respondent of an unsafe locomotive and appliances in violation of the provisions of said act, contrary to the provisions of Article 2, Secs. 5 and 19 of the Constitution of the State of Illinois and the Seventh Amendment of the Constitution of the United States of America, and in violation of the right to a jury trial of such issues secured and guaranteed to the petitioner thereby, and deprives the petitioner of property without due process of law and of equal protection of the laws contrary to and in violation of the provisions of the

Fourteenth Amendment of the Constitution of the United States of America.

2. The judgment of the Appellate Court of Illinois for the First District denies to petitioner the right to the jury's determination heretofore properly made in the rendition of the verdict on which judgment was duly entered in the Superior Court of Cook County, Illinois, on May 7, 1948, of the issues of fact as to whether the locomotive, its tender, parts and appurtenances, including the rear light on the tender, were in proper condition and safe to operate in the service to which they were put without unnecessary peril to life or limb as required by the provisions of the Federal Boiler Inspection Act (45 U. S. C. Sec. 23; 36 Stat. 913, 38 Stat. 1192; 43 Stat. 629) and as to whether the injuries sustained by petitioner were caused or contributed to by the unlawful use by the respondent of an unsafe locomotive and appliances in violation of the provisions of said act, contrary to the provisions of Article 2, Secs. 5 and 19 of the Constitution of the State of Illinois and the Seventh Amendment of the Constitution of the United States of America, and in violation of the right to a jury trial of such issues secured and guaranteed to the petitioner thereby, and deprives the petitioner of property without due process of law and of equal protection of the laws contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States of America.

3. The Appellate Court of Illinois for the First District has erroneously decided federal questions, namely, whether the locomotive and tender and all parts and appurtenances thereof, including the rear light of the tender, were in proper condition and safe to operate in the service to which they were put without unnecessary peril to life or limb as required by the provisions of the Federal Boiler Inspection Act (45 U. S. C. Sec. 23; 36 Stat. 913; 38 Stat. 1192, 43 Stat. 629) and as to whether the injuries sustained

by petitioner were caused or contributed to by the unlawful use by the respondent of an unsafe locomotive and appliance in violation of the provisions of said act, contrary to the provisions of said act and to the applicable and controlling federal decisional law interpreting and applying said act.

4. The judgment of the Appellate Court of Illinois for the First District denies to petitioner the right to a trial by jury of issues of fact as to whether the coal car was equipped with an efficient hand brake as required by the provisions of the Federal Safety Appliance Act (45 U. S. C. Sec. 11; 36 Stat. 298) and as to whether the injuries of petitioner were caused or contributed to by the unlawful use by the respondent of a coal car not equipped with an efficient hand brake, in violation of the provisions of said Act, contrary to the provisions of Article 2, Secs. 5 and 19 of the Constitution of the State of Illinois and the Seventh Amendment of the Constitution of the United States of America, and in violation of the right to the petitioner thereby, and deprives the petitioner of property without due process of law and of equal protection of the laws contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States of America.

5. The judgment of the Appellate Court of Illinois for the First District denies to petitioner the right to the jury's determination heretofore properly made in the rendition of the verdict on which judgment was duly entered in the Superior Court of Cook County, Illinois, on May 7, 1948, of the issues of fact as to whether the coal car was equipped with an efficient hand brake as required by the provisions of the Federal Safety Appliance Act (45 U. S. C. Sec. 11; 36 Stat. 298) and as to whether the injuries of petitioner were caused or contributed to by the unlawful use by the respondent of a coal car not equipped with an efficient hand brake, in violation of the provisions

of said Act, contrary to the provisions of Article 2, Secs. 5 and 19, of the Constitution of the State of Illinois and the Seventh Amendment of the Constitution of the United States of America, and in violation of the right to a jury trial of such issues secured and guaranteed to the petitioner thereby, and deprives the petitioner of property without due process of law and of equal protection of the laws contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States of America.

6. The judgment of the Appellate Court of Illinois for the First District denies to petitioner the right to a trial by jury of issues of fact as to whether the coal car was equipped with an efficient hand brake as required by the provisions of the Federal Safety Appliance Act (45 U. S. C. Sec. 11; 36 Stat. 298) and as to whether the injuries of petitioner were caused or contributed to by the unlawful use by the respondent of a coal car not equipped with an efficient hand brake in violation of the provisions of said Act and contrary to the provisions of said Act and to the applicable and controlling Federal Decisional Law interpreting and applying said Act.

7. The judgment of the Appellate Court of Illinois for the First District is contrary to the law.

8. The judgment of the Appellate Court of Illinois for the First District is contrary to the evidence.

9. The decision, opinion and judgment of the Appellate Court of Illinois for the First District, erroneously invade and usurp the province of the jury in undertaking to redetermine, contrary to the permissible finding of the jury, the issues whether the locomotive, its tender, parts and appurtenances, including the rear light of the tender, were in proper condition and safe to operate in the service to which they were put without unnecessary peril to life or limb, and whether the injuries sustained by petitioner were

caused or contributed to by the unlawful use by the respondent of an unsafe locomotive and appurtenances in violation of the provisions of the Federal Boiler Inspection Act (45 U. S. C. Sec. 23; 36 Stat. 913, 38 Stat. 1192; 43 Stat. 629).

10. The decision, opinion and judgment of the Appellate Court of Illinois for the First District, erroneously invade and usurp the province of the jury in undertaking to redetermine, contrary to the permissible finding of the jury, the issues whether the hand brake on the coal car was efficient and whether the injuries sustained by petitioner were caused or contributed to by the unlawful use by the respondent of a coal car not equipped with an efficient hand brake in violation of the provisions of the Federal Safety Appliance Act (45 U. S. C. Sec. 11; 36 Stat. 298).

11. The decision, opinion and judgment of the Appellate Court of Illinois for the First District, violate the Federal Rule respecting the amount and sufficiency of evidence to entitle petitioner to the benefits and protection of the Federal Boiler Inspection Act (45 U. S. C. Sec. 23; 36 Stat. 913; 38 Stat. 1192; 43 Stat. 629), and to the decision by jury of all issues of fact relating thereto.

12. The decision, opinion and judgment of the Appellate Court of Illinois for the First District, violate the Federal Rule that the assertion of federal rights by the petitioner under the provisions of the Federal Boiler Inspection Act may not be defeated by any device of local practice and that uniformity in adjudication of federally created rights under said Act must be accorded by all courts in conformity with the federal decisional law.

13. The decision, opinion and judgment of the Appellate Court of Illinois for the First District, violate the federal rule respecting the amount and sufficiency of evidence to entitle petitioner to the benefits and protection of the Federal Safety Appliance Act (45 U. S. C. Sec. 11; 36 Stat.

298), and to the decision by jury of all issues of fact relating thereto.

14. The decision, opinion and judgment of the Appellate Court of Illinois for the First District, violate the Federal Rule that the assertion of federal rights by the petitioner under the provisions of the Federal Safety Appliance Act may not be defeated by any device of local practice and that uniformity in adjudication of federally created rights under said Act must be accorded by all courts in conformity with the federal decisional law.

Usually the record, on denial by the Illinois Supreme Court of leave to appeal, is returned to the Appellate Court on the entry of its order denying leave, and the writ of certiorari properly issues out of this Court to the Appellate Court of Illinois. *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 140; *Chesapeake & Ohio* v. *Mihas*, 280 U. S. 102; *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44. In this instance, however, the record remains lodged in the Illinois Supreme Court, although the Appellate Court did, of necessity and in fact, pass upon the constitutional questions presented by the assignment of errors in the writ of error proceeding, because they were asserted in the Appellate Court as some of the grounds for petitioner's application in that Court for a rehearing and for leave to appeal and for a Certificate of Importance (R. 321-341, 345).

It would therefore seem that the writ of certiorari should issue to the Illinois Supreme Court in this particular case with respect to all three proceedings in that Court. Such a writ would suffice to bring the entire record before this Court.

To avoid burdening this Court unnecessarily by repetition, and since this Court will consider cause No. 738 concurrently with this petition, petitioner begs leave to refer to the petition, brief and reply brief in cause No. 738 to the same extent and with like effect as if that proceeding and this proceeding were one and the same, as in effect they are, but without limiting petitioner or this Court from consid-

ering the complete records in all three proceedings in all of the courts below, which are now before this Court.

Petitioner submits that this Court has the authority and jurisdiction to review all three proceedings in the Illinois Supreme Court, and the judgment of the Appellate Court on a single writ of error directed to the Illinois Supreme Court, or, if need be, also on writ of error directed to the Appellate Court of Illinois for the First District, not only under the provisions of Title 28, United States Code, Section 1257(3), but also in the exercise of this Court's common law jurisdiction to issue all writs necessary and appropriate in aid of its jurisdiction agreeable to the usages and principles of law, as authorized by Section 1651(a), Title 28, United States Code.

Cases believed to sustain the jurisdiction of this Court are: *Brown* v. *Western Railway of Alabama,* 338 U. S. 294; *Urie* v. *Thompson,* 337 U. S. 163; *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196; *House* v. *Mayo,* 324 U. S. 42; *Ex Parte Republic of Peru,* 318 U. S. 578; *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Gospel Army* v. *City of Los Angeles,* 331 U. S. 543; *Republic Natural Gas Co.* v. *State of Oklahoma,* 334 U. S. 62; *Price* v. *Johnston,* 334 U. S. 266; *Young* v. *Ragen,* 337 U. S. 235; *Radio Station WOW* v. *Johnson,* 326 U. S. 126; *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21; *Ex Parte United States,* 287 U. S. 129; *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541.

II.

STATUTES INVOLVED.

This action arose and was determined under the provisions of the Federal Employers' Liability Act, (45 U.S.C. Sec. 51 et seq.), the Federal Boiler Inspection Act, (45 U.S.C. Sec. 23), and the Federal Safety Appliance Act, (45 U.S.C. Sec. 11), all of which are set forth in the appendix.

Also involved are Rules 101, 129 and 131 of the Interstate Commerce Commission (C.F.R. Title 49, Parts 1-19, §§ 91.101, 91.129, 91.131), which are likewise set forth in the appendix.

III.

QUESTIONS PRESENTED.

1. Does the Federal Boiler Inspection Act itself, unaided and unrestricted by any order of the Interstate Commerce Commission, require that all parts and appurtenances of a locomotive and tender used on the line of an interstate common carrier by railroad be maintained at all times in proper condition and safe to operate in the service to which same are put without unnecessary peril to life or limb?

2. Can a violation of the Federal Boiler Inspection Act be predicated only on a violation of an order of the Interstate Commerce Commission?

3. Do the orders of the Interstate Commerce Commission, requiring a part or appurtenance—such as a rear headlight—to be provided and maintained in good condition on a locomotive, exempt the carrier from violation of the Federal Boiler Inspection Act when such part or appurtenance is in bad order and by reason thereof causes or contributes to an injury to its interstate employee, except when the injury is suffered at the precise time and under the exact circumstances and in connection with the momentary particular use to which the locomotive is then being put, contemplated by a narrow and strict interpretation of the language of the Interstate Commerce Commission orders?

4. Is a rear headlight permanently affixed to the rear of a tender of a locomotive, a part and an appurtenance of the locomotive within the purview and command of the Federal Inspection Act itself, and required thereby to be in proper condition and safe to operate in the service to which the same is put without unnecessary peril to life or limb, irre-

spective of any order which the Interstate Commerce Commission has promulgated on the subject?

5. Does the Boiler Inspection Act require only that a locomotive and its parts be in such condition that no additional perils be "created," or does it require that they be in such condition that all unnecessary perils be avoided?

6. When a cause is tried to a jury on the uncontested theory and premise that the coal car was equipped with an inefficient hand brake which, although set, permitted it to drift from a safe place to a place fouling the main track, and substantially undisputed evidence to that effect is admitted expressly without objection, is the Appellate Court authorized to reverse a jury's verdict upon the ground that it was error to allow full damages if the jury found that the hand brake on the coal car was inefficient and permitted it to drift from a safe to an unsafe place and thereby contributed to cause the injuries?

7. Can the right to a trial by jury, and to a jury's proper determination, of the issues of fact with respect to violation by the carrier of the Federal Safety Statutes, and the desirable uniformity in the determination and enforcement of federally created rights under such statutes in conformity with the federal decisional law, be denied and thwarted in the state courts, by the limitations, restrictions and technicalities of the local law and the rules of court relating to and regulating practice and procedure governing appeals and other forms of review?

8. Has petitioner been denied the right to trial by jury, and to the jury's proper determination, of the issues in this action?

9. Is there any evidence in the record which would warrant a jury to find that any negligence on the part of petitioner contributed to cause his injuries and authorize any reduction of the damages to which he is entitled?

10. If there be any such evidence, is not any negligence which could be attributed to petitioner so infinitesimal and

unsubstantial compared to the gross multiple negligence of respondent as to make the principle of *de minimis* applicable?

IV.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner, employed by the respondent as a brakeman on an interstate freight train, brought an action against the respondent in the Superior Court of Cook County, Illinois, under the provisions of the Federal Employers' Liability Act (45 U.S.C. Secs. 51 et seq.), the Federal Boiler Inspection Act (45 U.S.C. Sec. 23) and the Federal Safety Appliance Act (45 U.S.C. Sec. 11), to recover damages for personal injuries sustained by petitioner about ten minutes before midnight on November 14, 1946, in respondent's dark, unlit railroad yard in Fort Wayne, Indiana. (R. 49-55.)

Petitioner duly demanded a trial by jury (R. 49) and recovered judgment, entered on the jury's verdict, for $40,000.00, on May 7, 1948. (R. 311-2)

The respondent admits liability under the Federal Employers' Liability Act. (R. 38)

At the trial respondent admitted and expressly refrained from contesting its liability under the Federal Safety Appliance Act. (R. 55-57, 73, 84, 260-5)

Petitioner, while riding on the stirrup on the engineer's side at the rear of the tender as it proceeded backward on a main track at 5 to 8 miles an hour in the darkness of midnight in respondent's unlit railroad yard, was caught between the side of the tender and the side of the coal car standing on a spur track, admittedly too close to and fouling the main track. Petitioner was unable to see the dangerous position of the coal car until he was within 10 or 12 feet of it, due to the defective condition of the rear light on the tender, which, according to his testimony, was dim

and out of focus and looked like it had been smashed and the reflector was off, and which cast its dim rays up in the air at an angle of about 45° instead of along the tracks, as it was intended and designed to do, leaving the area for 50 to 75 feet immediately in back of the tender in complete darkness, although the reflection of the light was sufficient to enable one to see an object as large as a box car in the further distance. (R 66, 67, 93)

The engineer, respondent's witness, who was looking in the direction of travel out of the cab window some forty feet (the length of the tender) behind petitioner, testified that he first saw the dangerous position of the coal car when the rear of the tender was 70 to 80 feet from the coal car, and that, although the engine was just drifting or coasting along with the throttle shut off and with no steam in the cylinders, and he could have stopped within 30 feet, he did nothing about stopping the engine and just continued to drift along. (R. 194-8)

The movement was stopped with the corner of the coal car right at the cab, according to petitioner (R. 74, 91-4), or about half way of the tank, according to respondent's witness, the fireman (R. 190). In other words, the locomotive travelled 90 to 120 feet after the engineer saw the dangerous position of the coal car, although it could have been stopped within 30 feet.

At the trial respondent did not contest its liability under the Federal Safety Appliance Act.

Respondent had taken petitioner's deposition ten months before the trial, and was therefore well aware of his claims and prospective testimony with respect to the inefficient hand brake on the coal car which permitted it to drift from a safe position on the spur track to the dangerous position, fouling the main line. (R. 84)

In opening respondent's case to the jury, its counsel who had personally taken petitioner's deposition and has wide experience in this type of litigation, stated:

"Now I notice what Mr. Fuerst said about how the car got there. I don't know if it was put there or whether it had drifted there.

"In other words, if the brakes were defective in holding the car. But I do know the car was too close to this track to clear a man riding on it. In other words a man could get in there, but he would have to hunch in close. * * *" (R. 56)

Petitioner testified that on his way to report for duty around 9:15 or 9:30 P.M. on the night he was injured, he saw the coal car on the spur track in the clear, about ten feet in from the switch, and a regular yard brakeman was setting the brake on it (R. 71-4); and that when brakes are set on cars and they are functioning efficiently, they hold the cars in place where they are braked, and if they are not functioning efficiently, the car will drift on a slope.

Petitioner further testified, expressly without objection which was withdrawn after it had been sustained by the trial court (R. 73) as follows:

"Q. What would you say, from the point where the brake was applied, where you saw it applied, where this car was in the clear, to where the car was when you started to work with your engine and your body came in contact with that car, whether the brake was efficient?"

"Mr. Moir: I object to that, if your Honor please.

"The Court: Objection sustained.

"Mr. Fuerst: May I respectfully—

"Mr. Moir: Just a minute, if your Honor please. I withdraw the objection. Proceed.

"The Court: All right.

"Mr. Moir: Have the question read.

(Question read.)

"A. No, I would say it wasn't.

"Mr. Fuerst: When brakes are set on cars and they are working efficiently, do they permit the cars to drift?

"A. No, sir." (R. 73-4)

Respondent offered no evidence to contradict this testimony. It did not call the yard brakeman who set the brake

on the coal car before the accident, nor any one who had anything to do with moving it from its dangerous position and setting the brake after the accident, and it is inconceivable that the car was left in its dangerous position fouling the main track after it had caused injury to one of respondent's employees.

Respondent produced no profile map of the spur track, as it would have done if there were any honest question about the direction of the slope.

The fact of the matter is perfectly apparent from the entire record that the case was tried on the undisputed theory that the hand brake on the coal car was inefficient and permitted the car to drift from a safe to a dangerous position, and that petitioner was entitled to full damages for such injuries as the jury found he sustained. The proposition that respondent was entitled to a reduction of damages because of any contributory negligence on the part of petitioner is afterthought culled from fine-combing of the record with legalistic legerdemain after the trial was concluded and solely for purposes of appeal. As before stated, respondent did not even tender a request for any instruction that the damages should or could be diminished on account of any contributory negligence on the part of petitioner.

The evidence does not warrant any finding of negligence on the part of petitioner. The most that could be said is that he should have had better night vision, enabling him to see better in the darkness than either he, or the engineer or fireman could do, or that he should have had better judgment in the emergency with which he was suddenly faced, and should have tried to get off the moving engine in the darkness in the short space of 10 or 12 feet.

If any negligence could be attributed to him on either score, petitioner submits that any such negligence is so infinitesimal compared to the gross multiple negligence of the respondent, as to invoke the principle of *de minimis*.

Nevertheless, the Appellate Court, holding that petitioner was not entitled to the protection of the Federal Boiler In-

spection Act, and that the evidence and proceedings did not warrant the instruction to the jury that petitioner was entitled to full damages if the jury found that respondent's violation of the Federal Safety Appliance Act contributed to petitioner's injuries, has reversed the judgment in favor of the plaintiff and remanded the case for retrial of the questions concerning the nature and extent of petitioner's injuries and the amount of damages to which he is entitled, without the benefit of the protection of the Boiler Inspection Act in any event, or of the Safety Appliance Act if additional evidence of the inefficiency of the hand brake on the coal car is not presented, and permitting respondent to seek a reduction of damages on account of contributory negligence of petitioner which was not claimed or sought by any requested instruction at the trial under review.

V.

REASONS FOR ALLOWANCE OF WRIT.

1. The decision of the Appellate Court which the Supreme Court of Illinois has refused to review, denudes the Federal Boiler Inspection Act of its primary, positive and clear command, and substitutes therefor rules of the Interstate Commerce Commission too narrowly construed, and is capricious, arbitrary and void and contrary to the provisions of the act and to the controlling federal decisional law. Federal Boiler Inspection Act, 45 U. S. C. Sec. 23; I. C. C. Rules 101, 129, 131, C. F. R. Title 49, Parts 1-91, Secs. 91.1 pp. 1236; *Tiller* v. *Atlantic Coast Line Railroad*, 323 U. S. 574; *Southern Ry. Co.* v. *Lunsford*, 297 U. S. 398; *Lilly* v. *Grand Trunk Western Railroad Co.*, 317 U. S. 481; *Louisville & N. R. Co.* v. *Botts*, 173 F. (2d) 164; *Bolan* v. *Lehigh Valley R. Co.*, 167 F. (2d) 934; *Hines* v. *Smith*, 275 Fed. 766.

2. The right to a trial by jury and to the jury's proper determination of the issues with respect to violation of the provisions of the Federal Boiler Inspection Act and the casual connection of such violation with the injuries sus-

tained by the petitioner has been finally and irrevocably denied the petitioner by the decisions of the Appellate Court of Illinois and of the Supreme Court of Illinois in violation of the petitioner's right to such jury trial under the provisions of the 7th amendment of the Constitution of the United States, and petitioner has been denied equal protection of the laws contrary to the provisions of the 14th amendment of the Constitution of the United States and to the federal decisional law governing and controlling the determination and enforcement of the relator's federally created rights. *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476; *Urie* v. *Thompson*, 337 U. S. 163; *Brown* v. *Western Railway of Alabama*, 338 U. S. 294.

3. The decisions of the State courts of Illinois in this cause violate the rule of desirable and essential uniformity in the adjudication of federally created rights and decide federal questions contrary to the applicable and controlling federal decisions. *Brown* v. *Western Railway of Alabama*, 338 U. S. 294; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476.

4. The public at large, including travellers on the railroads and on the public highways, as well as all railroad employees and common carriers by railroad engaged in interstate commerce, will be irreparably injured and damaged, and their rights destroyed, and endless abortive litigation will be engendered, if the opinion of the Appellate Court of Illinois for the First District, which the Supreme Court of Illinois has refused to review, be permitted to stand. The opinion of the Appellate Court has been ordered to be published in full under Rule 36 of that court providing for the publication of only such decisions "as contain a discussion of a new or doubtful question of law, or involve the application of rules of law to a novel state of facts, or decide a new or unsettled question of practice" and will be cited and considered as authority for the nonliability of a carrier which permits a rear headlight or any

other part or appurtenance of a locomotive to be out of order and ineffective unless an order of the Interstate Commerce Commission requires the safety device to be in good order at the particular time and for the particular use to which the locomotive is then being put. Rule 36 of the Appellate Court of Illinois for the First District; *Woods* v. *New York, Chicago & St. L. R. Co.*, 339 Ill. App. 132, 88 N. E. (2d) 740; *Fairport P. & E. R. Co.* v. *Meredith*, 292 U. S. 589.

5. The opinion of the Appellate Court, which the Supreme Court of Illinois has refused to review, with respect to the violation of the Federal Safety Appliance Act is contrary to the controlling federal decisions with respect to the sufficiency of evidence in order to make an issue of fact for a jury determination and is contrary to the law of the State of Illinois and to the fair administration of justice in any jurisdiction with respect to trial of a cause involving uncontested issues. *Affolder* v. *New York, C. & St. L. R. Co.*, No. 200, Oct. Term 1949, decided March 13, 1950, 70 S. Ct. 509; *Lavender* v. *Kurn*, 327 U. S. 645; *Myers* v. *Reading Co.*, 331 U. S. 477; *Cusson* v. *Canadian Pacific Ry. Co.*, 115 F. (2d) 430; *Eker* v. *Pettibone*, 110 F. (2d) 451; *Spotts* v. *Baltimore & Ohio R. Co.*, 102 F. (2d) 160; *Anderson* v. *Baltimore & O. R. Co.*, 89 F. (2d) 629, certiorari denied 302 U. S. 696; *Didinger* v. *Pacific R. Co.*, 39 F. (2d) 798; *Pennsylvania R. R. Co.* v. *Auchenbach*, 16 F. (2d) 550; *Brown* v. *Western Railway of Alabama*, 338 U. S. 294; *Williams* v. *New York Central R. Co.*, 402 Ill. 494; *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Anderson* v. *Chesapeake & O. R. Co.*, 352 Ill. 561; *Allen* v. *United States Fidelity & Guaranty Co.*, 269 Ill. 234; *Peterson* v. *General Rug & Carpet Cleaners*, 333 Ill. App. 47; *Kluska* v. *City of Chicago*, 97 Ill. App. 665.

PRAYER.

WHEREFORE your petitioner prays that a Writ of Certiorari issue out of this Court directed to the Supreme Court of the State of Illinois, commanding said Court to certify and send to this Court the record of the proceedings in case No. 31428 in the Supreme Court of Illinois, entitled *William Edward Woods, Plaintiff-in-Error* v. *The New York, Chicago and St. Louis Railroad Company, a corporation, Defendant-in-Error,* and in case No. 31429 in said Supreme Court of Illinois, entitled *William Edward Woods, Petitioner,* v. *The New York, Chicago and St. Louis Railroad Company, a corporation, Respondent,* as well as the record of proceedings in case No. 31427 in said Supreme Court of Illinois, entitled, *The People of the State of Illinois on Relation of William Edward Woods, Petitioner* v. *John M. Touhy, Presiding Justice, Grover C. Niemeyer and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents,* in accordance with the petition heretofore filed in this Court, in cause No. 738, October Term, 1949, and, if need be, that Writ of Error issue out of this Court directed to the Appellate Court of Illinois for the First District commanding said Court to certify and send to this Court the record of proceedings in case No. 44745 in said Appellate Court of Illinois, entitled *William Edward Woods, Plaintiff,* v. *The New York, Chicago & St. Louis Railroad Company, a corporation, Defendant,* to the end that said causes may be reviewed and that the proceedings therein be determined by this Court as of right and justice ought to be done, and that the judgment of the Appellate Court of Illinois for the First District be reversed and the judgment of the Superior Court

of Cook County, Illinois entered therein on May 7, 1948 in favor of petitioner and against respondent for the sum of $40,000.00 and costs be affirmed.

WILLIAM EDWARD WOODS,
Petitioner.

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June 10, 1950

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

OPINION BELOW.

The opinion of the Appellate Court of Illinois for the First District is officially reported in *Woods* v. *New York, Chicago & St. Louis R. Co.*, 339 Ill. App. 132. It is also reported in 88 N. E. (2d) 740.

The Supreme Court of Illinois has delivered no opinion. Its order dismissing the Writ of Error sued out by petitioner is contained in the Writ of Error Record, p. 319. Its order dismissing petitioner's petition for leave to appeal is contained in the Leave to Appeal Record, p. 357.

2.

JURISDICTION.

The grounds upon which the jurisdiction of this Court is invoked are:

1. Under Section 1651(a) of Title 28 of the United States Code, and in the exercise of the inherent jurisdiction of this Court to issue all common law writs necessary and appropriate in aid of its jurisdiction agreeable to the uses and principles of law, this Court has jurisdiction, by such writ as may be needful to that end, to review the federal questions involved in petitioner's claim of federally created rights and the federal questions herein arising under the Federal Employers' Liability Act (45 U. S. C. Secs. 51 et seq.), the Federal Boiler Inspection Act (45 U. S. C. Sec. 23) and the Federal Safety Appliance Act (45 U. S. C. Sec. 11), and to restore and preserve to petitioner his right to a trial by jury and to the jury's proper determination of the issues arising under the Federal Safety Statutes as guaranteed to him by the Constitution of the State of Illinois and of the United States, and as provided as a part and

parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act, and to enforce the rule announced by this Court that uniformity in the adjudication of the federally created rights under the federal statutes involved herein is desirable and essential, whether the enforcement of such rights be sought in the state or federal courts. U. S. Constitution, Art. III, §§ 1, 2; 28 U. S. C. § 1651; *Brown* v. *Western Railway of Alabama,* 338 U. S. 294; *Urie* v. *Thompson,* 337 U. S. 163; *United States Alkali Export Ass'n.* v. *United States,* 325 U. S. 196; *House* v. *Mayo,* 324 U. S. 42; *Ex Parte Peru,* 318 U. S. 578.

2. Under Section 1257(3) of Title 28 of the United States Code this Court has statutory jurisdiction to review the final order of the Supreme Court of Illinois, the highest court of that state, dismissing the Writ of Error sued out by petitioner and to review the federal questions involved in petitioner's claim of federally created rights under the federal statutes above referred to, including petitioner's right to a trial by jury and to the jury's proper determination of the issues arising under the Federal Safety Statutes, in accordance with the method provided thereby, and by the Constitutions of the State of Illinois and of the United States, where a trial by jury of the issues has been properly demanded, and the question of petitioner's claim to equal protection of the law guaranteed to him by the United States Constitution. U. S. Constitution, Seventh and Fourteenth Amendments; Illinois Constitution, Art. 2, Sec. 5; Art. VI, Sec. 11. 28 U. S. C. § 1257(3); *Dinoffria* v. *Brotherhood of Teamsters,* 399 Ill. 304, cert. denied 335 U. S. 815; *Mirich* v. *Forchner Contracting Co.,* 312 Ill. 343, *Sixby* v. *Chicago City Ry. Co.,* 260 Ill. 478; *Siegel* v. *Chicago City Ry. Co.,* 325 Ill. 43; *Spencer* v. *Chicago City Ry. Co.,* 366 Ill. 120; *Burket* v. *Reliance Bank & Trust Co.,* 367 Ill. 196; *Goodrich* v. *Sprague,* 376 Ill. 80; *Scott* v. *Freeport Motor Casualty Co.,* 379 Ill. 155; *Cuneo* v. *City of Chicago,* 272 Ill. 473; *Williams* v. *New York Central Railroad Co.,* 402 Ill. 494; *Geiger* v. *Merle,* 360 Ill. 497, *Clark* v. *Hansen,*

320 Ill. 480; *C. R. I. & P. Ry.* v. *People*, 217 Ill. 164; *People* v. *Kelly*, 367 Ill. 616; *Wilkinson* v. *McCarthy*, 336 U .S. 53; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476; *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350.

3. Under Section 1257(3) of Title 28 of the United States Code, this Court has jurisdiction to review the final order of the Supreme Court of the State of Illinois, dismissing petitioner's petition to that Court for leave to appeal and the judgment of the Appellate Court of Illinois for the First District, reversing the judgment of the Superior Court of Cook County and remanding the cause to that Court for further proceedings in conformity with the opinion of the Appellate Court. Under that opinion, petitioner is forever barred from any relief under the Federal Boiler Inspection Act, as far as the courts of Illinois are concerned, even though the jury concededly was warranted in finding that the light on the rear of the tender was defective and out of focus, and failed to function as it was intended to function, namely to light the way as the locomotive backed through the dark, unlit railroad yard and to avoid the very peril that befell petitioner.

This Court, by its recent decisions, has erased the twilight zone of distinction between substantive rights and procedural remedies in enforcing the relief Congress, in enacting the Federal Employers' Liability, Boiler Inspection, and Safety Appliance Acts, and the amendments of August 11, 1939, intended to accord railroad workmen employed in the hazardous undertaking of operating the dangerous instruments of interstate railroad common carriers, and has made it crystal clear that substance, and not form, determines the question of finality of state court decisions subject to review by this Court.

Archaic technicalities of common law pleading and outmoded legalistic concepts of cause of action and finality of judgments have been swept into discard by this Court in its determination to get directly at the heart of legal controversies and dispense justice realistically rather than theoretically. In the formulation of the Federal Rules of

Civil Procedure this Court has entirely and with deliberation discarded the phrase "cause of action" and adopted the term, "right to relief" which is the real objective of all litigation and is free from the mass of scholasticism which has long enshrouded the concept sought to be expressed. In *Gospel Army* v. *City of Los Angeles,* 331 U. S. 543, it was said:

> "Increasingly this Court has become less formal in the matter of final judgments. It is no longer the rule that the face of the judgment is determinative of whether it is final. Today the test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court. * * *"

By that test, the judgment of the Appellate Court and the order of the Illinois Supreme Court finally and fully adjudicate petitioner's right to any relief under the Federal Boiler Inspection Act. He has exhausted all proper remedies open to him under the state law, and that adjudication is not subject to further review by any state court.

The date upon which the order of the Supreme Court of Illinois entered March 14, 1950, dismissing the Writ of Error and the order of said Court entered March 16, 1950, dismissing the petition for leave to appeal and the judgment of the Appellate Court of Illinois for the First District entered November 21, 1949, sought to be reviewed, became final on the adjournment of the March 1950 Term of the Supreme Court of Illinois on March 17, 1950.

3.

STATEMENT OF THE CASE.

The nature of the case has been substantially set forth in the petition herein and in the petition and brief in cause No. 738, and need not be repeated.

However, with the complete record now before the Court, attention should be called to additional facts.

Petitioner was 28 years of age (R. 57), was 5′ 7½″ tall, and weighed 150 pounds (R. 102). He is married and has one son, and his wife and son, and his wife's parents, are dependent on him for support (R. 96). He was raised in an orphanage and all of the work he has done since leaving the Orphans Home was hard laborious physical work (R. 57-63, 95-96). He was earning approximately $300.00 a month at the time he was injured (R. 62).

The chief issues litigated at the trial were the nature and extent of the injuries he sustained when he was crushed and rolled in the narrow space 3 or 6 to not more than 10 inches wide between the side of the tender and the side of the coal car for a distance of 5 feet, according to his testimony (R. 74) or ten or more feet, according to the testimony of respondent's witness, Eberhardt (R. 183-5), who was the only other witness besides petitioner to testify on the subject of what occurred to petitioner. There is utterly no justification in the record for the Appellate Court's statement that petitioner was "brushed off" the engine (R. 38).

The principal dispute with respect to petitioner's injuries was whether admittedly existing pelvic fractures, which respondent's doctor, who attended petitioner after the railroad accident, testified would disable a man from engaging in heavy labor work (R. 173), occurred when petitioner was crushed and rolled between the tender and coal car, or had occurred in an automobile accident in 1942 (R. 58-61, 81-104, 144-164, 199-217). It is not disputed, however, that petitioner for three years before the railroad accident did constantly engage in heavy labor work (R. 59-62, 83-80, 95-96), and before being employed by respondent he was examined by one of the Company surgeons and found to be physically fit (R. 61, 98-103).

Petitioner admittedly suffered a dislocated right shoulder and an injury to his left ankle to which the Company surgeon applied a splint and which the jury was warranted in finding consisted of a fracture involving the astragalus or ankle joint (R. 169).

Petitioner, so the jury was justified in finding, has been totally and permanently incapacitated by the injuries sustained in the railroad accident from doing the only kind of work he has engaged in since leaving the orphanage. His loss of earnings in the four years elapsing since the accident until this Court can act in this case will approximate $14,000.00.

Respondent's witness, the engineer, testified that if the back-up light was working efficiently, a car could be seen eight hundred feet away (R. 198). However, he also testified that although looking back in the direction in which the locomotive was backing, the rear of the tender was between 70 or 80 feet from the coal car when he first saw that the coal car might not clear. He could have stopped within less than half that distance, but he did not do anything—just kept drifting along (R. 193-8). The fireman, also respondent's witness, testified that the back-up light on the engine involved was like all the rest of the engines and one could see 100 or 150 feet when the light was lit, but the first he saw of the coal car was when he was about 75 feet from it (R. 189-193).

The other brakeman, Eberhart, who was riding on the ladder leading to the gangway into the cab right under the engineer, testified that he did not see the coal car at all until after the accident and that all that he observed about the back-up light was that it was lit. He crawled up n the cab when the engineer shouted some kind of a warning, and when the engine stopped he came down between the tank and the car and had to squeeze through by turning sideways, the clearance between the car and the engine being approximately six inches (R. 181-8, 249-250).

4.

SPECIFICATION OF ERRORS.

The Supreme Court of Illinois erred:

1. In dismissing the writ of error sued out by petitioner, and in thereby denying to petitioner his right to a trial by

jury of the issues with respect to the questions whether respondent's violations of the Federal Boiler Inspection Act and the Federal Safety Appliance Act caused or contributed to cause petitioner's injuries, and to the jury's proper determination of those questions.

2. In dismissing petitioner's petition to the Supreme Court of Illinois for leave to appeal from the judgment of the Appellate Court of Illinois for the First, and in refusing to reverse said judgment and to affirm the judgment of the Superior Court of Cook County, Illinois, in favor of petitioner and against respondent.

5.

ARGUMENT.

Summary.

Petitioner begs leave to refer to his brief in cause No. 738 and requests that it be read in support of this petition. In further support of this petition petitioner contends:

The adjudication by the highest courts of Illinois that the Boiler Inspection Act cannot be made the basis of an action by petitioner is final and is subject to review on statutory certiorari by this court, under Section 1257(3), Title 28, United States Code. Furthermore this court has potential jurisdiction on the ultimate conclusion of this action to review the questions which have arisen under both the Federal Boiler Inspection Act and the Federal Safety Appliance Act and the constitutional questions presented with respect to petitioner's right to a trial by jury and to the jury's proper determination of such issues, irrespective of the technical finality of the adjudication at this time, and under its inherent common-law jurisdiction pursuant to the provisions of Section 1651(a), Title 28, United States Code, it can do so now. This court should accept jurisdiction of this case now in the interest of justice and the enforcement of the rule of desirable and essential uniformity

in the adjudication of federally created rights, and to avoid inflicting on petitioner irreparable damage and injury in the enforcement thereof. It is common knowledge that the most powerful bludgeon which parties, who are legally and morally obligated to make compensation for injuries negligently inflicted on a working man, whose daily labor is the daily bread for himself and his family, hold over their heads, is delay. No truer axiom was ever uttered than "Justice delayed is justice denied". In this case the respondent is admittedly liable for injuries which the jury was entitled to and did find were serious, grave, permanent and disabling. On the undisputed facts it is submitted that no jury would, or should, find that any negligence contributing to his injuries is attributable to petitioner. If any such negligence could be attributed to him it could only be because he failed or was unable to see the dangerous position of the fouling coal car before he did see it, or because he failed to take some other action in the emergency suddenly confronting him, and any such negligence on his part would be so small in proportion to the gross and multiple negligence of the respondent that there could be no reasonable expectation of any materially different result of the advantage to respondent on any new trial and that the principle of *de minimis* should be applied.

I.

The Adjudication by the Highest Courts of Illinois that the Boiler Inspection Act Cannot Be Made the Basis of an Action by Petitioner is Final and is Subject to Review on Statutory Certiorari by this Court.

The complaint alleges, and the facts warrant, three distinct rights to relief for petitioner's grave and serious injuries for which the jury, after a fair trial, awarded him $40,000.00, caused by the admitted negligence of the respondent: (1) A right to damages under the Federal Employers' Liability Act, based on the admitted and proven

gross and multiple negligence of the respondent, subject to reduction in the proportion to the amount of negligence, if any, attributable to petitioner; (2) A right to full damages under the Federal Boiler Inspection Act; and (3) A right to full damages under the Federal Safety Appliance Act.

The Appellate Court of Illinois has held as a matter of law that petitioner is not entitled to recover any damages under the Federal Boiler Inspection Act, even though the rear headlight or back-up light on the tender was defective by reason of which petitioner was unable to see the dangerous position of the coal car in time to avoid injury. The basis of that ruling is that the orders of the Interstate Commerce Commission do not require any light in view of the use to which the locomotive was being put at the moment of injury.

As has been shown in petitioner's brief in cause No. 738, pp. 29-40, that ruling is grossly and patently erroneous, and is contrary to all applicable decisions of this Court and other courts, and finds no support in any authoritative decisions anywhere.

Petitioner has exhausted every proper remedy in the courts of Illinois to correct that ruling. He petitioned the Appellate Court for a rehearing (R. 321-329). On denial of that petition (R. 319), petitioner applied to the Appellate Court for leave to appeal to the Supreme Court of Illinois and for a Certificate of Importance (R. 342-7). On denial of such leave by the Appellate Court (R. 319), petitioner instituted in the Supreme Court of Illinois the three proceedings which are the subject of this petition and of the petition in cause No. 738.

The adjudication is not subject to further review by any state court on this or any other record. The basis of the adjudication that petitioner is not entitled to the benefit of the Federal Boiler Inspection Act is not subject to change by any other, different or additional evidence on any new trial.

Under the law of Illinois, as the Supreme Court of that state has held in *Newberry Library* v. *Board of Education*, 387 Ill. 85 and *Roddy* v. *Armitage Hamlin Corporation, Inc.*, 401 Ill. 605, an order or judgment disposing of one of two causes of action, even though both be directed to the same relief, is final.

And this Court, looking to the realities and not the ancient legal theories and nomenclature of a situation, applies the practical test whether in fact rights have been fully adjudicated in determining the question whether the adjudication is final and therefore subject to review by this court. *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543; *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U. S. 62; *Price* v. *Johnston*, 334 U. S. 266; *Young* v. *Ragen*, 337 U. S. 235; *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541; *Affolder* v. *New York C. & St. L. R. Co.*, 70 S. Ct. 509.

The right of petitioner to relief under the Federal Boiler Inspection Act has been fully adjudicated by the courts of the State of Illinois. Nearly four years have elapsed since petitioner was incapacitated through the admitted negligence of the defendant from earning a livelihood for himself and family in his accustomed work, and it is not unlikely that as many more years will be consumed in litigation if respondent pursues its past delaying tactics in making compensation for its admitted wrong. The expense of litigation appears to be no deterrent for the respondent in resisting petitioner's just claim against it.

Any negligence which can conceivably be attributed to the petitioner (and it is submitted that none can, should, or will be) in so infinitesimal on the undisputed facts in proportion to the gross and multiple negligence of the respondent, that no materially different result can reasonably be expected on any new trial on the basis of a reduction of damages on account of any contributory negligence which any jury might attribute to petitioner.

On the undisputed facts, in view of respondent's admitted liability under the Federal Employers' Liability Act, a new trial would, in effect, be merely an assessment of damages to which petition is entitled, giving respondent the opportunity of seeking to have petitioner's damages reduced on account of contributory negligence on his part, which the respondent did not seek by any request for instructions to the jury on the trial under review, and it is submitted that any deduction which might conceivably be made on that account would be so small and so inconsequential that further delay in requiring respondent to compensate petitioner for the injuries it negligently caused him to suffer would not be warranted and would be most unjust.

II.

The Adjudication by the Highest Courts of Illinois on the Questions Which Have Arisen in this Action Under Both the Federal Boiler Inspection Act and the Federal Safety Appliance Act, and the Constitutional and Statutory Questions as to Petitioner's Right to a Trial by Jury and to the Jury's Proper Determination of the Federal Questions, is Arbitrary and Capricious, and Constitutes an Abuse of the Judicial Power of the State, and is Subject to Review at this Time by this Court in the Exercise of Its Inherent Common-Law Jurisdiction Pursuant to Section 1651(a), Title 28, United States Code.

This Court has potential jurisdiction to review the federal questions which have arisen under both the Federal Boiler Inspection Act and the Federal Safety Appliance Act and the federal questions as to the petitioner's right to jury determination of the issues involved in them. The adjudication of these questions by the Appellate and Supreme Courts of Illinois, is so manifestly contrary to the applicable decisions of this Court, that it is an abuse of the judicial power of the State. It subjects petitioner to a judi-

cial wrong out of all proportion to the theoretical right of respondent to seek a reduction of damages for the injuries for which it is admittedly liable to petitioner under the Federal Employers' Liability Act, although it did not seek any such reduction on the trial under review. While under the local practice in Illinois the adjudication of these federal questions by the Appellate and Supreme Court is the law of the case and is not open to further review in any state court, this Court, as it did in *Urie* v. *Thompson,* 337 U. S. 163, could review them years hence if petitioner should receive a less favorable judgment on a retrial. If he should obtain a larger verdict and the judgment entered on it be allowed to stand, he would not be heard to complain and the opinion of the Appellate Court would for all time be destructive of the desirable and essential uniformity in the adjudication of such federal questions which this Court has said must be observed in all courts, state as well as federal. *Brown* v. *Western Railway of Alabama,* 338 U. S. 294, *Brady* v. *Southern Ry. Co.,* 320 U. S. 476; *Urie* v. *Thompson,* 337 U. S. 163.

The decision of the state courts deprives the petitioner of his right to a trial by jury of the issues with respect to respondent's violation of the Federal Safety Statutes, and to the jury's proper determination of such issues, which this Court has repeatedly and with increasing insistence said is part and parcel of the remedy afforded railroad workers by the Federal Employers' Liability Act, and is being restored by the recent decisions of this Court in this important class of cases. *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350; *Wilkerson* v. *McCarthy,* 336 U. S. 53.

In these circumstances, it is submitted that this Court can and should exercise its inherent common law jurisdiction to issue all writs which are necessary and appropriate in aid of its jurisdiction as authorized by Section 1651(a) of Title 28, United States Code, if there be any doubt about the technical finality of the judgment and orders sought to

be reviewed. To all intents and purposes they are final as to petitioner's right to recover under the Federal Safety Statutes in the state courts of Illinois. They are indefensibly wrong and petitioner has no remedy except at the hands of this Court.

Respectfully submitted,

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June 10, 1950

APPENDIX.

Federal Employers' Liability Act (45 U.S.C. Sec. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery track, roadbed, works, boats, wharves, or other equipment." Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Federal Employers' Liability Act (45 U.S.C. Sec. 53):

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66."

Federal Boiler Inspection Act (45 U.S.C. Sec. 23):

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and

unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, Sec. 2, 36 Stat. 913; Mar. 4, 1915, c. 169, Sec. 1, 38 Stat. 1192; June 7, 1924, c. 355, Sec. 2, 43 Stat. 659."

Federal Safety Appliance Act (45 U.S.C. Sec. 11):

"It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * * Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298."

Rules of Interstate Commerce Commission.

Rule 101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control. (Code of Federal Regulations, Title 49, Parts 1-91, Sec. 91.101, p. 1236)

Rule 129. (a) Locomotives used in road service.—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

(b) Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.

(c) Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

(d) When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight. (Code of Federal Regulations, Title 49, Parts 1-91, Sec. 91.129)

Rule 131. Locomotives used in yard service.—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotives and one on the rear, each of which shall enable a person in the cab of the locomotive under the condtions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition. (Code of Federal Regulations, Title 49, Parts 1-91, Sec. 91.131)

JUL 12 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 125

WILLIAM EDWARD WOODS,
Petitioner,

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Subject Index.

PAGE

Jurisdiction 1

Questions Presented 2

Statutes Involved 2

Statement of the Case 3

Argument 9

Summary of Argument.

The judgment of the Appellate Court of Illinois is not final and therefore this Honorable Court lacks jurisdiction to review it 9

The judgment of the highest court of a state in which a decision could be had reversing and remanding a case for a new trial, is not a final decision and cannot be reviewed by this Court . 10

Even if it be assumed that the Appellate Court's opinion was a final ruling by a final Illinois court (which it is not) as to petitioner's right to recover under the Boiler Inspection Act, its judgment is not final because the cause was remanded for a new trial for assessment of damages, at all events under the Federal Employers' Liability Act, and petitioner may yet make out a case under the Safety Appliance Act 13

Petitioner's jurisdictional authorities distinguished 16

Petitioner's jurisdictional authorities, instead of demonstrating that this Court has jurisdiction conclusively demonstrate that it has not 16

Petitioner's efforts to avoid a new trial are all contrary to established rules of law, have imposed unnecessary burdens on this Court and the Supreme Court of Illinois, and have created unnecessary delay 18

It is well established the Supreme Court of Illinois did not have jurisdiction to review the judgment of the Appellate Court of Illinois by the various methods of review attempted by petitioner 18

Table of Cases.

Abrams v. Awotin, 388 Ill. 26 21
Arnold v. United States, 263 U. S. 427, 434 16
A. T. & S. F. Railway Co. v. Scarlett, 300 U. S. 471 6
Baker v. White, 92 U. S. 176 10
Bagdonas v. Liberty Land and Investment Co., 309 Ill. 103 ..... 20, 21
Belskis v. Dering Coal Co., 246 Ill. 62, 66 4
Bostwick v. Brinkerhoff, 106 U. S. 3 10
Brown v. Union Bank of Florida, 4 How. 465 10
Brown v. Western Railway of Alabama, 338 U. S. 294 .. 16
Chase Securities Corporation v. Donaldson, 325 U. S. 304, 311 13
Cincinnati Street Railway Co. v. Snell, 179 U. S. 395, 397 10
Corcoran v. City of Chicago, 373 Ill. 567 20
Cowen v. Beneficial Industrial Loan Corporation, 337 U. S. 541 16
Cowen v. Harding Hotel Co., 396 Ill. 477, 479 19
Davis v. Crouch, 94 U. S. 514 10
Dinoffria v. Brotherhood of Teamsters, 399 Ill. 304 21
Dinsmoor v. Rowse, 211 Ill. 317, 319 4
Dowdall v. Hutchens, 347 Ill. 326, 327 ..... 18, 19
Ex Parte Republic of Peru, 318 U. S. 578 16
Goodrich v. Sprague, 376 Ill. 80 20
Gospel Army v. City of Los Angeles, 331 U. S. 513, 543, 546 ..... 10, 11
Gray v. Jones, 178 Ill. 169, 172 12
Hallberg v. Goldblatt Bros., 363 Ill. 25 21

Haseltine v. Central Bank of Springfield, 183 U. S. 130, 131 ..... 10, 13
House v. Mayo, 324 U. S. 42 16
Houston v. Moore, 3 Wheat. 433 10
Johnson v. Keith, 117 U. S. 199 10
Louisiana Navigation Co. v. Oyster Commission, 226 U. S. 99 14
Market Street R. Co. v. R. R. Commission, 324 U. S. 548, 551 13
McComb v. Commissioners, 91 U. S. 1 10
Merich v. Forschner Contracting Co., 312 Ill. 343 20
Moore v. Robbins, 18 Wall. 588 10
Myers v. Reading Co., 331 U. S. 477 5
Newberry Library v. Board of Education, 387 Ill. 85 20
Parcels v. Johnson, 20 Wall. 653 10
People v. Green, 355 Ill. 468 19
People v. Lewe, 383 Ill. 549 19
Price v. Johnston, 334 U. S. 266 16
Radio Station WOW, Inc. v. Johnson, 326 U. S. 120 .. 17
Randall v. Board of Commissioners, 261 U. S. 252 22
Read v. Boyle, 234 Ill. 105 18
Republic Natural Gas Co. v. Oklahoma, 334 U. S. 62, 64, 68 ..... 9, 14
Rescue Army v. Municipal Court, 331 U. S. 549 17
Rice v. Sanger, 144 U. S. 197 10
Rigdon v. More, 242 Ill. 256, 259 4
Riley v. Lamson, 253 Ill. 258 18
Roche v. Evaporated Milk Association, 319 U. S. 21 .. 16
Roddy v. Armitage-Hamlin Corporation, Inc., 401 Ill. 605 20

St. Clair County v. Lovingston, 18 Wall. 628 10
Scott v. Freeport Motor Casualty Co., 379 Ill. 155 ... 20
Sixby v. Chicago City Railways Co., 260 Ill. 478 20
Streeter v. Humrichouse, 357 Ill. 214, 234, 238 .....12, 18
Tracy v. Holcombe, 24 How. 426 10
United States v. Corsi, 287 U. S. 129 16
United States Alkali Export Association v. United States, 325 U. S. 196 16
Urie v. Thompson, 337 U. S. 163 15
Winn v. Jackson, 12 Wheat. 135 10
Western Union Telegraph Co. v. Hughes, 261 U. S. 252 22
Young v. Ragen, 337 U. S. 235 17

CONSTITUTIONAL CITATION.

Article VI, § 11, Ill. Const., 1870 20

STATUTES CITED.

28 U. S. C. § 1257 ..... 2, 9
28 U. S. C. § 1651(a) 9
Federal Employers' Liability Act, 45 U. S. C. § 51, et seq. 4
Boiler Inspection Act, 45 U. S. C. § 23 4
Safety Appliance Act, 45 U. S. C. § 11 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 125.

WILLIAM EDWARD WOODS,
Petitioner,

vs.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

This Honorable Court lacks jurisdiction to issue certiorari because the judgment of reversal and remandment for a new trial by the Appellate Court of Illinois is not a "final judgment or decree" within the meaning of the Judicial Code (28 U. S. C. § 1257). A petition to the Supreme Court of Illinois for leave to appeal from the judgment was dismissed by that court because of a similar want of jurisdiction; a writ of error proceeding instituted in that Court was likewise dismissed.

II.

QUESTIONS PRESENTED.

1. Is the judgment of the Appellate Court of Illinois reversing and remanding for a new trial, attempted reviews of which by petition for leave to appeal and writ of error were dismissed by the Supreme Court of Illinois because of lack of jurisdiction, a "final judgment" rendered by the highest Court of a State in which a decision could be had within the meaning of 28 U. S. C. § 1257?

2. Assuming this Court has jurisdiction to review the judgment of the Appellate Court of Illinois, did that Court properly hold that there was no evidence tending to prove petitioner's contention that respondent had violated the Boiler Inspection and Safety Appliance Acts, and that instructions which permitted the jury to find a violation of such acts should not have been given?

III.

STATUTES INVOLVED.

Title 28, Section 1257 of the United States Code.
Federal Employers' Liability Act (45 U. S. C. § 51 *et seq.*).
Boiler Inspection Act (45 U. S. C. § 23).
Safety Appliance Act (45 U. S. C. § 11).

IV.

STATEMENT OF THE CASE.

Petitioner seeks review of the following interlocutory judgment of the Appellate Court of Illinois:

> "Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County for such other and further proceedings as to law and justice shall appertain in conformity with the opinion of this Court this day filed herein." (R. 318, 319.)[1]

Petitioner has hitherto sought to have the interlocutory judgment at bar reviewed by the Supreme Court of Illinois by petitioning to Appellate Court for an appeal which it denied (R. 319), by petitioning the Supreme Court for an appeal (R. 1-37) which petition was dismissed (R. 357) and by suing out a writ of error from the Supreme Court to the Appellate Court (R. 301) which was dismissed on respondent's motion (Writ of error record, pp. 319, 310). (Petitioner also attempted what we have termed an "indirect review" by seeking an original writ of mandamus from the Supreme Court of Illinois to the Appellate Court. The refusal of the Supreme Court of Illinois to entertain such action is the subject of Case No. 738, October Term 1949, in this Court.)

Although page 2 of the petition for certiorari refers to the judgment as one "reversing the judgment" of the trial

1. Record references, unless otherwise indicated, are to the brown covered printed record.

court, nevertheless petitioner concedes (p. 8) that the judgment, as construed by the Illinois cases, is not one of outright reversal but of reversal and remand for a new trial. Where the parties are entitled to a jury trial and the judgment is reversed by a reviewing Court for errors intervening prior to entry of judgment and the cause is remanded generally, the parties are entitled, under Illinois law, to a trial *de novo*. *Rigdon* v. *More*, 242 Ill. 256, 259; *Belskis* v. *Dering Coal Co.*, 246 Ill. 62, 66. "The cause then stands in the Court below precisely as if no trial had occurred." *Dinsmoor* v. *Rowse*, 211 Ill. 317, 319.

This judgment of reversal and remandment for a new trial by the Appellate Court of Illinois was entered on an appeal by respondent from a judgment of the Superior Court of Cook County entered on the verdict of a jury in an action to recover for personal injuries under the Federal Employers' Liability Act (45 U. S. C. §§ 51-59), the Federal Safety Appliance Act (45 U. S. C. § 11) and the Federal Boiler Inspection Act (45 U. S. C. § 23).

Respondent on appeal, while admitting liability under the Federal Employers' Liability Act, assigned a number of errors for reversal and new trial, the principal ones being that the court (1) "erred in giving instructions permitting recovery under the Safety Appliance and Boiler Inspection Acts because there is no evidence of a violation of either," and, (2) "that the damages awarded are excessive" (R. 39).

The Appellate Court found it necessary to pass only on the contentions with respect to the instructions. It held with respect to the Safety Appliance Act:

1. That petitioner's testimony that about two hours before the accident on a dark night (R. 94; Pet., p. 4) he saw the coal car involved on a spur track about ten feet in from the switch and a brakeman "setting the brakes"

(R. 71), coupled with the fact that subsequently at the time of the accident the coal car fouled the main track, did not constitute evidence tending to prove an inefficient brake on the coal car. Citing this Court's decision in *Myers* v. *Reading Co.*, 331 U. S. 477, the Appellate Court pointed out that there were two recognized methods of showing the inefficiency of handbrake equipment, namely, evidence of some particular defect or evidence of failure to function "when operated with due care, in a normal, natural and usual manner." It pointed out that petitioner made no claim under the first method and that the evidence "fails utterly to meet the requirements of the second." To meet the requirements of the second petitioner had to show that the "brake was actually set with due care and in a normal, natural and usual manner" and that "the slope of the spur track was such as to cause a spotted car to move or drift toward the main track unless an efficient brake was properly set." Petitioner did neither. Testimony by petitioner that he saw a brakeman "setting the brakes" was proof only of an "incomplete operation." The only evidence as to the slope of the spur track was the testimony of three members of petitioner's crew that the spur track sloped "away from the main track" and therefore "drift of the coal car toward the main track was impossible" (R. 39, 40). Therefore, there was no evidence tending to prove a violation of the Safety Appliance Act.

Petitioner asserts at least seven times in his present petition that respondent admitted liability at the trial under the Safety Appliance Act (pp. 3, 7, 8, 19, 20 and 21). This is not so. Repeated reiteration of this misstatement while aggravating does not make it true. Respondent vigorously contested any liability under the Safety Appliance Act at the trial. (See also arguments on motion for new trial in the Trial Court, R. 265-272; 289-301.)

One of the bases of the Appellate Court's holding that

there was no evidence tending to prove a violation of the Safety Appliance Act was the uncontradicted testimony of three witnesses for respondent that the spur track sloped away from the main track. Counsel refer to an opening statement made by counsel for respondent two and a half days before respondent had begun to put on its case and had an opportunity to interview respondent's out-of-state witnesses to the effect that counsel did not know whether the coal car fouled the main because it had been put there or whether it had drifted there (R. 56). As the Appellate Court remarked in its opinion, " 'I do not know' is not an admission of facts as to which counsel declares his lack of knowledge" (R. 40).

With respect to petitioner's claim that there was a violation of the Boiler Inspection Act, the Appellate Court held:

2. That petitioner's uncorroborated testimony that a non-focusing, back-up light was "out of focus" and was piercing the sky at "about a forty-five degree angle" (R. 93) (contradicted by other members of the crew) did not tend to prove a violation of the Boiler Inspection Act because, under appropriate rules of the Interstate Commerce Commission, no rear light was required at the time of the movement in question (Title 49, Code of Federal Regulations, § 91.129). Citing this Court's decision in *A. T. & S. F. Railway Co.* v. *Scarlett*, 300 U. S. 471, and certain State Court decisions, it held that "strict compliance with the rules and specifications of the commission is fulfillment of the carrier's duty" (R. 41); that since under the rules of the Interstate Commerce Commission respondent was "under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the Act, was not properly focused" (R. 42). In other words, the Court, considering the only purpose of a light,

held in effect that the light, even if allegedly defective, was better than no light at all, and if there had been no light at all the jury could not have found a violation of the Boiler Inspection Act. Therefore, there was no evidence tending to prove a violation of the Boiler Inspection Act.

The Appellate Court further held that the errors in giving the instructions in question required a reversal and remandment for a new trial. It pointed out that under the two Safety Acts the defense of contributory negligence cannot be asserted either as a defense or in mitigation of damages, but it must be considered in reduction of damages under the Federal Employers' Liability Act; that "the damages awarded ($40,000) are large and it may be that the jury, relying on the instructions relating to the Safety Appliance and Boiler Inspection Acts, failed to consider the question of contributory negligence in making the award" (R. 42).

In conformity with its views the Appellate Court entered the judgment above quoted. Then came the persistent efforts of plaintiff somehow, some way to avoid a new trial by securing review of a non-reviewable, non-final order. The present petition is but another step in what, in our experience, is an unprecedented campaign to obtain further review of any interlocutory judgment. The petition and brief make such consistently unwarranted claims that a lengthy answer seems necessary.

Petitioner, after denial of a petition for rehearing (R. 319), and the denial of an appeal by the Appellate Court (R. 319), petitioned the Supreme Court of Illinois for leave to appeal. Respondent moved the Supreme Court of Illinois to dismiss the petition because the judgment of the Appellate Court was not final, and therefore the Supreme Court had no jurisdiction (R. 350-355). The Supreme Court dismissed the petition (R. 357). Concur-

rently petitioner sued out a writ of error from the Supreme Court to the Appellate Court (writ of error record, p. 301). Respondent, as defendant in error, moved to dismiss the writ because the Supreme Court lacked jurisdiction to review the judgment of the Appellate Court by writ of error (writ of error record, p. 310), which motion the Supreme Court granted (Writ of Error record, p. 319). The mandamus effort is set forth in Case No. 738, October Term, 1949.

We submit that the judgment of the Appellate Court is correct for the reasons stated in the opinion, but nothing would be served by a brief addressed to the merits of the case, or undertaking to correct petitioner's erroneous factual statements, because the judgment of the Appellate Court is not final and is not reviewable by this Honorable Court. Accordingly, in our argument, we address ourselves to the jurisdictional question.

IV.

ARGUMENT.

A.

The Judgment of the Appellate Court of Illinois Is Not Final and Therefore This Honorable Court Lacks Jurisdiction to Review It.

Under 28 U. S. C. § 1257 (3) this Court has jurisdiction to review by certiorari only "final judgments or decrees rendered by the highest Court of a State in which a decision could be had, * * *." Although petitioner claims in the petition that this Court has jurisdiction to review under 28 U. S. C. § 1651 (a) even though the judgment of the Appellate Court is not final[3] (Pet., p. 35), and that this Court has "swept into discard" "outmoded legalistic concepts of * * * finality of judgments" (p. 31), such claims are directly contrary to repeated holdings by this Court. This Court in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 64, in referring to former § 237 of the Judicial Code (now 28 U. S. C. § 1257) recently said that in order to "avoid the evils of piecemeal review," "Ever since 1789, Congress has granted this Court the power of review in State litigation only after the highest Court of a State in which a decision in a suit could be had has rendered a final judgment or decree."

As this Court also observed in that case, "no self-enforcing formula defining when a judgment is 'final' can be devised" and various general tests have been laid down.

3. The power conferred by 28 U. S. C. § 1651, to issue writs, is of course, only a power to issue writs in aid of a jurisdiction otherwise existing. It is not any source of jurisdiction to review State Court judgments.

One of these which is "well settled and of long standing" is that "a judgment or decree to be final, * * * must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment or decree it had already rendered." *Bostwick* v. *Brinkerhoff*, 106 U. S. 3. Of course, this could never be so where the judgment of the State Court sought to be reviewed is one of reversal and remandment for a trial *de novo* as in the case at bar. There is no question better settled by the decisions of this Court than that a judgment of the highest Court of a State in which a decision could be had reversing and remanding the case for further proceedings at law, as for a new trial, or in equity, is not a final decision and cannot be reviewed by this Court. *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543; *Johnson* v. *Keith*, 117 U. S. 199; *St. Clair County* v. *Lovingston*, 18 Wall. 628; *Parcels* v. *Johnson*, 20 Wall. 653; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Brown* v. *Union Bank of Florida*, 4 How. 465; *Tracy* v. *Holcombe*, 24 How. 426; *McComb* v. *Commissioners*, 91 U. S. 1; *Baker* v. *White*, 92 U. S. 176; *Davis* v. *Crouch*, 94 U. S. 514; *Rice* v. *Sanger*, 144 U. S. 197; *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130; *Houston* v. *Moore*, 3 Wheat. 433; *Winn* v. *Jackson*, 12 Wheat. 135; *Moore* v. *Robbins*, 18 Wall. 588.

As said by this Court in *Cincinnati Street Railway Co.* v. *Snell*, 179 U. S. 395, 397:

> "We have held in too many cases even to justify citation, that a judgment reversing a cause and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court."

In *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, 546, this Court recently said:

> "Under § 237 of the Judicial Code, 28 U. S. C. § 344,

> [now 28 U. S. C. § 1257] only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' *Department of Banking* v. *Pink*, 317 U. S. 264, 267. *Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final.*" (Italics added.)

The foregoing authorities are squarely in point and require a denial of the petition.

Petitioner's contention that this Court has jurisdiction is based on the following assertions:

On the retrial petitioner will be unable to recover under the Boiler Inspection Act because the nature of the Appellate Court's ruling is such that it does not appear possible that he can introduce any additional evidence that can avoid the Appellate Court's ruling (Pet., p. 7). Therefore, it is asserted he is "forever barred from any relief under the Federal Boiler Inspection Act, as far as the Courts of Illinois are concerned, * * *"[4] (Pet., p. 31).

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4. Actually, petitioner's claimed right to recover under the Boiler Inspection Act is not "forever barred" by the Illinois Courts even if it be assumed that petitioner cannot possibly overcome the Appellate Court's ruling by the introduction of additional evidence on a retrial and that the Appellate Court on an appeal by him would continue to adhere to its ruling under the "law of the case" rule.

If the trial court on a retrial, and on the same evidence, in conformity with the Appellate Court's mandate refused to give instructions permitting recovery under the Boiler Inspection Act, petitioner would have a right of appeal even from a judgment in his favor to the Appellate Court. Under Illinois law a party in whose favor a judgment is rendered may appeal and "obtain a reversal for an error prejudicial to him. * * * If he is able to assign any error or has not obtained all that he deems himself entitled to, he may appeal, under the statute, and where a trial is

No pretense is made that this is so under the Appellate Court's holding with respect to the claimed violation of the Safety Appliance Act, although counsel repeatedly make the erroneous statement that respondent admitted liability under this Act at the time of the trial. After having asserted that petitioner is "forever foreclosed" (p. 7) under the Boiler Inspection Act, it is then asserted that the *judgment* of the Appellate Court is reviewable:

> "Under the familiar principles which this Court has always applied where jurisdictional basis exists as to any one branch of a case, it can decide all other federal questions presented by the record, including the question whether the evidence and proceedings at the trial warranted the instruction to the jury that petitioner was entitled to full damages, if the jury found that a violation of the hand-brake provision of the Federal Safety Appliance Act contributed to his injuries." (Pet., p. 9.)

In other words, so petitioner asserts, since the Appellate Court has made an asserted final decision as to one branch of his case, therefore this Court has jurisdiction to review the judgment reversing the whole case for a new trial. No authorities are cited in support of these so-called "familiar principles" and they are non-existent.

Petitioner had, and has, only one cause of action for his injuries even though he claimed respondent was liable under the absolute liability imposed by the two Safety Statutes, and for negligence under the Federal Employers' Liability Act. "It is not uncommon that a single cause of action in tort will rest both on omission of a statutory duty and on

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de novo he may appeal to secure a larger judgment or more complete relief." *Gray* v. *Jones,* 178 Ill. 169, 172. If the Appellate Court adhered to its views under the "law of the case" rule, petitioner could then petition for leave to appeal to the Supreme Court. The Appellate Court's non-reviewable decision on the first appeal would not be binding on the Supreme Court of Illinois. *Streeter* v. *Humrichouse,* 357 Ill. 234.

common law negligence; the two bases do not necessarily multiply the causes of action." *Chase Securities Corporation* v. *Donaldson,* 325 U. S. 304, 311.

Whether petitioner can introduce additional evidence on a retrial which will obviate the Appellate Court's ruling on the Boiler Inspection Act cannot be said with certainty; but if it be that he cannot and even if he was suing solely under that Act, the present *judgment* would not be final. As said by this Court in *Haseltine* v. *Central Bank of Springfield,* 183 U. S. 130, 131, for the reasons stated in the opinion, "We have, therefore, always • • • refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case."

However, the fact is that petitioner seeks to recover under three Acts, and no pretense is made that the Appellate Court's ruling is such on the claimed Safety Appliance Act violation, that there is no possibility that on a retrial he may not be able to introduce additional evidence which would overcome the Appellate Court's holding. Conceivably, he may introduce additional evidence that the brake actually was set "with due care, in the normal, natural, and usual manner" by the claimed brakeman, and that, contrary to what respondent's witnesses testified, the slope of the spur track was towards the main. (Petitioner gave no testimony as to slope, one way or the other on the trial.) Therefore, even if it be assumed *arguendo* that the Appellate Court's *opinion* is a final ruling by a final Illinois court[5] (which it is not) as to one branch of the case, its *judgment* is not final because the cause is remanded for new trial for assessment of damages, at all events under the Liability Act, and petitioner may yet make out a case under the Safety Appliance Act.

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5. The State Court judgment must be final "in two senses. • • • It must be the final word of a final Court." *Market Street R. Co.* v. *R. R. Commission,* 324 U. S. 548, 551.

Squarely contrary to the assertion made at page 9 of the petition above quoted, is this Court's decision in *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99, where it held that even if the State Court judgment does finally dispose of some elements of the controversy, unless it is final as to the entire controversy this Court can not review it.

The action was one to recover damages for slander of title to described lands, and the trial court dismissed the plaintiff's petition because it stated no cause of action. The Louisiana Supreme Court, reviewing the averments, expressed the opinion that a cause of action was stated, *i. e.,* that there was an allegation of title to some of the land, but that there was no title alleged as to other parts. It remanded the cause for further proceedings in accordance with its opinion. The petitioner then sued out a writ of error upon the theory that federal questions were involved and contended that the judgment of the Louisiana Supreme Court was final because the opinion of that Court finally disposed of a substantial part of the lands involved and hence in remanding for further proceedings did so only as to the other lands. But this Court stated at page 101 that "conceding this to be true, it does not justify the claim based on it," because, "* * * it is settled that this Court may not be called upon to review by piecemeal the action of a State Court which otherwise would be within its jurisdiction * * *."

In *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 68, this Court, citing three earlier decisions, said:

> "Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined **and all that needs to be adjudicated is the amount of** damages."

And in the same case, in dismissing an appeal from the

Supreme Court of Oklahoma affirming a certain order of a State regulatory commission because the judgment was not final, quoting from *Collins* v. *Miller,* 252 U. S. 364, 371, this Court also said:

> "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this Court."

Urie v. *Thompson,* 337 U. S. 163, demonstrates conclusively (a) that the present judgment of the Appellate Court is non-final and non-reviewable by this Court, but (b) that petitioner's asserted rights, if any, under the Boiler Inspection Act are not "forever barred" but may be reviewed under the judgment that will eventuate from the new trial. In that case the plaintiff filed a complaint (petition) under the Federal Employers' Liability Act. The Trial Court sustained a demurrer. The Missouri Supreme Court held that the complaint did not state a cause of action under the Federal Employers' Liability Act but did state one under the Boiler Inspection Act and reversed and remanded the cause for trial (353 Mo. 211, 176 S. W. 2d 471). A trial resulted in a verdict and judgment for the plaintiff under the Boiler Inspection Act. On a second appeal the Missouri Supreme Court reversed outright on the ground that the Boiler Inspection Act did not cover silicosis, the injuries for which plaintiff was suing (357 Mo. 738, 210 S. W. 2d 298). This Court on a review of this second judgment which was final, pointed out that the first ruling that the complaint did not state a cause of action under the Federal Employers' Liability Act was not final and was not reviewable by this Court at the time it was entered because the cause was remanded for trial but was reviewable on the review of the subsequent final judgment. This Court then went on to hold that the complaint did in fact state a cause of action under the Federal Employers' Liability Act as well as the Boiler Act.

In *Arnold* v. *United States*, 263 U. S. 427, 434, this Court said:

> "It is well settled * * * that to be reviewable a judgment or decree must be * * * final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved * * *."

B.

Petitioner's Jurisdictional Authorities Distinguished.

At page 17 petitioner cites fourteen cases which he contends sustain the jurisdiction of this Court. Such of the cases as are in point, instead of demonstrating that this Court has jurisdiction, conclusively demonstrate that it has not.

Seven of the cases cited[6] have to do with this Court's power to review orders of inferior federal courts. Since this Court has not only power to review interlocutory as well as final orders of lower federal courts, the cases are wholly irrelevant.

Of the seven cases involving review of state court judgments, this Court dismissed for lack of finality of the judgment in two and assumed jurisdiction in five. The five in which the Court assumed jurisdiction are plainly distinguishable.

Brown v. *Western Railway of Alabama*, 338 U. S. 294, was an action under the Federal Employers' Liability Act, where the Trial Court sustained a general demurrer to a complaint and dismissed the action, which order the State Court of Appeals affirmed. Since the dismissal barred re-

6. *United States Alkali Export Association* v. *United States*, 325 U. S. 196; *House* v. *Mayo*, 324 U. S. 42; *Ex Parte Republic of Peru*, 318 U. S. 578; *Price* v. *Johnston*, 334 U. S. 266; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21; *United States* v. *Corsi*, 287 U. S. 129; *Cowen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541.

covery in any future proceeding, it was plainly a final judgment.

In *Rescue Army* v. *Municipal Court,* 331 U. S. 549, this Court held that a judgment of the highest state court denying a writ of prohibition against pending prosecutions for violation of municipal ordinances on grounds such ordinances were unconstitutional possessed finality to sustain an appeal to this Court. That it is utterly inapplicable is demonstrated by a mere recitation of this Court's holding.

In *Young* v. *Ragen,* 337 U. S. 235, this Court issued certiorari to various Illinois *nisi prius* courts (these courts under Illinois law were the highest courts in which a decision could be had) to review final orders denying petitions for habeas corpus.

In *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, this Court held that a state court's judgment directing immediate delivery to the transferor of property, the transfer of which was held to have been procured by fraud, was a final judgment, which, by reason of the presence of federal questions, was reviewable by this Court, even though it also directed an accounting of profits from such property, when the accounting ordered could not raise other federal questions.

Urie v. *Thompson,* 327 U. S. 163, as we have shown at page 15, is a decision squarely in support of our client's position rather than petitioners.

The only cases really in point on the issue involved are the two where this Court dismissed for lack of finality of the State Court judgment. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62 and *Gospel Army* v. *Los Angeles,* 331 U. S. 513, quoted from, *supra,* p. 10.

C.

Petitioner's Efforts to Avoid a New Trial Are All Contrary to Clearly Established Rules of Law, Have Imposed Unnecessary Burdens on This Court and the Supreme Court of Illinois, and Have Created Unnecessary Delay.

Counsel complain of delay (p. 36), but the real cause of delay before petitioner obtains any recovery is counsel's obstinate refusal to recognize that settled principles of law in each instance have been against their manifold attempts somehow to obtain a review of the Appellate Court judgment. A new trial might well have been had already but for the course pursued by petitioner's counsel.

Nothing is better settled under the law of Illinois than that the judgment entered by the Appellate Court is not a final judgment and was no more reviewable by the Illinois Supreme Court than by this Court. See, *Streeter* v. *Humrichouse,* 357 Ill. 234, 238 and *Riley* v. *Lamson,* 253 Ill. 258.[7] But in the teeth of these authorities, the first thing counsel did after the petition for rehearing was denied was to petition the Appellate Court of Illinois for leave to appeal to the Supreme Court and for a certificate of importance (R. 342-344). That move was completely without merit and was foredoomed to failure because it is settled law in Illinois that where the Appellate Court judgment is not final, "the Appellate Court in such case has no power to allow an appeal and grant a Certificate of Importance." *Dowdall* v. *Hutchens,* 347 Ill. 326, 327; *Read* v. *Boyle,* 234 Ill. 105. The Appellate Court accordingly denied this petition on December 12, 1949 (R. 319).

7. Additional authorities bearing on this point will be found in respondent's answer to petitioner's petition for leave to appeal to the Supreme Court of Illinois which appears at pages 350-355 of the record.

Next, counsel sought to evade the non-appealable character of the Appellate Court judgment by moving for leave to file an original mandamus action in the Supreme Court of Illinois to compel the Judges of the Appellate Court of Illinois to expunge their judgment and affirm the Trial Court judgment in his favor. Leave to file was denied by the Supreme Court of Illinois on January 10, 1950. A motion for reconsideration was denied on January 18, 1950. Counsel thereupon sought review by this Court of the foregoing action by the Supreme Court of Illinois (Cause No. 738, October Term, 1949; renumbered as Cause No. 43, October Term, 1950). This mandamus method of attempting to secure indirect review was filed squarely against settled Illinois law that original mandamus does not lie to correct allegedly erroneous judgments of inferior tribunals. See, *e. g., People* v. *Green,* 355 Ill. 468; *People* v. *Lewe,* 383 Ill. 549. The petition for certiorari to review the Supreme Court's order was filed in the teeth of settled law that this Court cannot review State Court judgments sustainable on adequate and independent non-federal grounds.[8]

Next, counsel filed a petition for leave to appeal in the Supreme Court of Illinois. This petition was filed in the face of settled law that a review of the judgments, orders and decrees of the Appellate Court by the Supreme Court can only be had where any such judgment, order or decree of the Appellate Court is a final order. *Dowdall* v. *Hutchens,* 347 Ill. 326, 327; *Cowen* v. *Harding Hotel Co.,* 396 Ill. 477, 479.[9] This petition was "*dismissed*" (R. 357) pursuant to respondent's request (R. 350-355), not "***denied***" as erroneously asserted by petitioner at one point in the

8. Additional authorities on both points can be found in the brief in opposition to petition for writ of certiorari filed by the respondents in cause No. 738, October Term, 1949.

9. Additional authorities on the foregoing point can be found in respondent's answer to petitioner's petition for leave to appeal filed in the Supreme Court of Illinois, which is found at pages 350-355 of the record.

petition (p. 9). The significance of the word "dismissed" rather than "denied" is that under Illinois law, where the Supreme Court has no jurisdiction to grant a petition, the order entered by the Court is one of dismissal (See authorities in respondent's answer to petition for leave to appeal filed in the Supreme Court of Illinois, pp. 351, 352 of the record).[10]

Concurrently with petitioner's petition for leave to appeal in the Supreme Court, he sued out a writ of error from the Supreme Court of Illinois to the Appellate Court in an effort to secure a review of the Appellate Court judgment. This attempt was made in the teeth of settled law that the judgment of the Appellate Court was not reviewable by writ of error.

Under Illinois law, writ of error is a practically obsolete method of securing review of Appellate Court orders in the Illinois Supreme Court in civil cases and is only available where the constitutionality of a statute has arisen for the first time in the Appellate Court.

This jurisdiction is conferred by Art. VI, § 11 of the Constitution of 1870 which provides that writs of error shall lie from the Supreme Court to the Appellate Court, *inter alia,* where "the validity of a statute is involved." *Bagdonas* v. *Liberty Land and Investment Co.,* 309 Ill. 103; *Corcoran* v. *City of Chicago,* 373 Ill. 567; *Sixby* v. *Chicago*

10. Petitioner in this Court cites the case of *Newberry Library* v. *Board of Education,* 387 Ill. 85, and *Roddy* v. *Armitage-Hamlin Corporation, Inc.,* 401 Ill. 605, to the effect that the Supreme Court of Illinois had jurisdiction to grant his petition for leave to appeal (pp. 8, 9). Whether the Supreme Court of Illinois had jurisdiction to grant the petition for leave to appeal is, of course, solely a question of state law and the fact that the Illinois Supreme Court "dismissed" rather than "denied" petitioner's petition is sufficient in itself to demonstrate the complete irrelevancy of the two cited cases. These same two cases were relied on in petitioner's petition for leave to appeal in the Supreme Court (R. 9, 10) and are adequately distinguished in respondent's answer to that petition at pages 353, 354 of the record.

City Railways Co., 260 Ill. 478; *Merich* v. *Forschner Contracting Co.*, 312 Ill. 343; *Goodrich* v. *Sprague*, 376 Ill. 80; *Scott* v. *Freeport Motor Casualty Co.*, 379 Ill. 155. Unlike the Supreme Court's jurisdiction under the Civil Practice Act of Illinois which is limited to a review of final judgments of the Appellate Courts, this constitutional jurisdiction is exercisable to review interlocutory orders of the Appellate Court. *Bagdonas* v. *Liberty Land & Investment Co.*, 309 Ill. 103; *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25.

Accordingly, petitioner sought to avail himself of this very limited jurisdiction to review interlocutory orders of the Appellate Court by suing out a writ of error to that Court and assigning numerous errors to the effect that the Appellate Court's judgment had deprived him of a right to a jury trial, denied him due process, equal protection, etc., contrary to the Illinois and Federal Constitutions (Writ of Error Record, pp. 303-309). This was done in the teeth of settled law that a contention to the effect that an erroneous Appellate Court judgment will deprive one of constitutional guarantees does not raise a constitutional question within the meaning of the writ of error jurisdiction of the Supreme Court but only presents the question "merely of the validity of the judgment." See, *e. g.*, *Abrams* v. *Awotin*, 388 Ill. 26. Accordingly, respondent filed a motion in the Supreme Court of Illinois to *dismiss* the writ of error on the grounds that the Court lacked jurisdiction to review the Appellate Court judgment by writ of error (Writ of Error Record, p. 210), which motion the Court granted on March 14, 1950 (Writ of Error Record, p. 319).[11]

11. At page 10 of the petition, petitioner, citing *Dinoffria* v. *Brotherhood of Teamsters*, 399 Ill. 304, asserts that the Supreme Court of Illinois had jurisdiction to review the Appellate Court judgment by writ of error. The fact the Supreme Court "dismissed" the writ is in and of itself sufficient to demonstrate the error of this contention. The *Dinoffria* case was one where the Supreme Court dismissed a writ of error to the Appellate Court pointing out (p. 390), "It is not enough to give this Court juris-

Now, after the numerous and sundry State Court proceedings petitioner is filing in this Court a petition which flies in the teeth of settled law as much as his earlier efforts. The petition not only asks that a writ of certiorari be directed to the Supreme and Appellate Courts[12] but even contends that this Court has jurisdiction to review the three proceedings in the Illinois Supreme Court and the judgment of the Appellate Court by writ of error (p. 17), although this method of review of State Court judgments was abolished in 1928 (45 Stat. 54).

The question naturally arises, therefore, why such desperate efforts to secure review of the unreviewable Appellate Court judgment?

This is not the case of an injured employee who has been denied any recovery whatsoever by the highest court of the state. On the contrary, respondent admits liability under the Federal Employers' Liability Act and petitioner is assured of recovering something on the new trial ordered by the Appellate Court.

Ostensibly, petitioner appears to be seeking to vindicate a claimed right to recover under the Boiler Inspection Act. Actually his frantic efforts to secure a review are an attempt, somehow and in some way, to hold on to a $40,000 verdict which, under the medical evidence in this case, was outrageously and grossly excessive. The Appellate Court's

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diction to contend only that one will be deprived of a constitutional right because of the erroneous judgment of the lower Court." (See writ of error record, pp. 316, 317.) The *Dinoffria* case was relied upon by petitioner in the Illinois Supreme Court while making the frivolous contention that the Appellate Court had held the Safety Acts to be "invalid" (writ of error record, pp. 316, 317).

12. Since the Supreme Court dismissed the writ of error and petition for leave to appeal for lack of jurisdiction, if the Appellate Court judgment were final, the writ, if issued, would be directed to the Appellate Court and not the Supreme Court. *Western Union Telegraph Co.* v. *Hughes*, 203 U. S. 505; *Randall* v. *Board of Commissioners*, 261 U. S. 252.

opinion recites that this point was raised by respondent in its appeal to the Appellate Court but the Appellate Court did not have to pass on it in view of its disposition of this case on other grounds.

As petitioner admits, the principal dispute with respect to his asserted injuries was whether certain pelvic fractures had occurred as a result of the accident sued on or as the result of an automobile accident in 1942. The testimony bearing on this point cannot be discussed adequately in brief fashion, but justice to the Appellate Court requires some reference to it in order to dispel the impression sought to be created that that Court rendered a highly technical decision which deprived petitioner of a wholly meritorious verdict.

Petitioner suffered a near fatal automobile accident in Billings, Montana, on April 27, 1942, in which he incurred numerous, severe and grave injuries (R. 83, 84) resulting in complete disablement until the Spring of 1943 (R. 59). He settled his claim against his then employer arising therefrom about May, 1943, on the basis that he was then 45% totally and permanently disabled (R. 82).

In the instant action he claimed that as a result of the accident in question he suffered, *inter alia,* certain pelvic fractures, while respondent contended that all he suffered was a dislocated shoulder and other minor injuries.

The accident in question occurred on November 14, 1946 and resulted in petitioner being taken to a hospital in Fort Wayne, Indiana, where various X-rays were taken, including some of his pelvic region. To prove his claim that he suffered the pelvic injuries as a result of the accident sued on rather than the prior 1942 accident, plaintiff used professional medical witness, one Dr. Greenspahn. Dr. Greenspahn examined petitioner in Chicago fifteen days after the accident sued on and at that time found no evidence of pelvic fractures. But on a second examination in January,

1947, he found X-ray evidence that plaintiff had suffered a fracture of the pelvis (R. 114). In an answer to a hypothetical question he said there "might or could" be a causal connection between the accident sued on and the healed pelvic fractures (R. 140).

On cross-examination the Doctor testified that he could distinguish between a fracture that was four or five days old and one that was years old (R. 151). He was put to the test by being handed two X-rays on which the date was covered and asked if the fractures shown in the pelvis were fresh or old. These X-rays (Defendant's Exhibits 4 and 5) were X-rays taken of the petitioner on November 14, 1946, immediately after petitioner was injured, and November 20, 1946, a week later (R. 202). When finally driven into a corner the doctor had to admit that "he didn't know whether they were four days old or years old" (R. 157).

Respondent, on the other hand, introduced evidence that the pelvic fractures shown in the X-rays taken on the night of plaintiff's accident, and a week later, were at least several months old (R. 226, 203, 235). This exposé of petitioner's professional medical witness, together with the uncontradicted evidence of respondent's doctors that the pelvic fractures shown by the X-rays were old at the time of petitioner's accident while employed by respondent, was so convincing to the Trial Court that he remarked in the argument on respondent's motion for new trial before him that it was his opinion "that the so-called pelvic fracture had nothing to do with this case" (R. 280; see, also, R. 305).

Respondent's evidence thus demonstrated that petitioner, in this action, was endeavoring to palm off pelvic fractures actually suffered in the 1942 accident. The action of the Appellate Court in reversing and remanding for a new trial has for the time being thwarted this effort—hence petitioner's persistent efforts to somehow get this verdict reinstated.

In cases where this Court has had jurisdiction some members of the Court have remarked how this class of cases distracts the Court's energies from questions of national importance. There is utterly no justification in this case for burdening the Court with a petition to review a judgment so plainly non-reviewable. Petitioner is assured of a recovery on a new trial which he might well have had by now, but for counsel's refusal to recognize that settled principles of law apply to his client as well as to all other litigants. The petition should be denied.

Respectfully submitted,

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FILED
SEP 8 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

NO. 125

WILLIAM EDWARD WOODS, *Petitioner,*

v.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

WILLIAM EDWARD WOODS
Petitioner

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INDEX

Petitioner's Reply Brief

Page

The Merits.

I. Respondent's Contention That It was Deprived of the Defense of Contributory Negligence is Wholly Untenable Even Though There Had Not Been Any Violation by the Respondent of Its Duty to Comply With the Federal Boiler Inspection and Federal Safety Appliance Acts 12

Jurisdiction.

I. This Court Has Jurisdiction to Review the Orders of the Illinois Supreme Court in the Mandamus Action 14

II. This Court Has Jurisdiction to Review the Judgments of the Appellate Court of Illinois and the Orders of the Supreme Court of Illinois Dismissing Petitioner's Writ of Error and His Petition for Leave to Appeal Which are Final Judgments and Decrees Within the Purview of Title 28, United States Code, Section 1257(3). In Any Event They are Further Subject to Review Under the Provision of Title 28, United States Code, Section 1651(a) 19

A. Federal Law 19

B. Illinois Law 24

TABLE OF CASES

Armstrong v. Obucino, 300 Ill. 140 17
Bailey v. Central Vermont Ry., 319 U. S. 350..... 26
Brady v. Southern Ry. Co., 320 U. S. 476..... 26
Cuneo v. City of Chicago, 272 Ill. 473..... 26
Cusson v. Canadian Pacific Ry. Co., 2d Cir. 1940, 115 F. (2d) 430 11
Department of Banking v. Pink, 317 U. S. 264.....22, 26

Page

Dickinson v. Petroleum Conversion Corporation, 70 S. Ct. 322 ..... 19, 20
Dinaffria v. Brotherhood of Teamsters, 399 Ill. 304.. 26
Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589.... 19
Gospel Army v. City of Los Angeles, 331 U. S. 543.... 21
Haseltine v. Central Bank of Springfield, 183 U. S. 130 ..... 20, 21
Hill v. Atlantic Coast Line R. R. Co., 336 U. S. 911.... 26
Louisiana Navigation Co. v. Oyster Commission, 226 U. S. 99 21
Marino v. Ragen, 332 U. S. 561..... 16
Mitchell v. Geister, 337 Ill. 390, 86 N. E. 2d 293 1949)..
People ex rel. German Insurance Co. v. Williams, 145 Ill. 573 14
People ex rel. Kerner v. Keeney, 399 Ill. 611..... 15
People ex rel. Mike Magloie v. Joseph Siman, 284 Ill. 28 17
People ex rel. Modern Woodmen of America v. The Circuit Court of Washington County, 347 Ill. 34.. 17
People ex rel. Prince v. Graber, 397 Ill. 522..... 15
People ex rel. John A. Swanson v. James J. Kelly, Judge, 352 Ill. 567 18
People ex rel. Woll v. Graber, 394 Ill. 362..... 15
Reeves v. Beardall, 316 U. S. 283..... 23
Republic Natural Gas Co. v. State of Oklahoma, 334 U. S. 62, 67 26
Richfield Oil Corporation v. State Board, 329 U. S. 69.. 22
Roddy v. Armitage Hamlin Corporation, Inc., 401 Ill. 605 (1949) 24, 25
Schneiderman v. Interstate Transit Lines, Inc., 401 Ill. 172 23
Sperry v. Wabash R. Co. (D. C. E. D. Ill. 1943), 52 F. Supp. 337 ..... 22, 25
The Town of Kaneville v. Meredith, 361 Ill. 556..... 23
Tiller v. Atlantic Coast Line R. R. Co., 323 U. S. 574.. 26
Wilkerson v. McCarthy, 336 U. S. 53..... 26

CONSTITUTIONAL CITATIONS

Illinois Constitution, Article II, Paragraph 19..... 18
Illinois Constitution, Article VI, Paragraph 2..... 14
Illinois Constitution, Article VI, Paragraph 11..... 25

STATUTES CITED

Page

Federal Employers' Liability Act, 45 U. S. C. §50-60, Acts of April 22, 1908, c. 149, 35 Stat. 65; August 11, 1939, c. 685, 53 Stat. 1404 ..... 4, 12, 22
Federal Boiler Inspection Act, 45 U. S. C. §23; Acts of February 17, 1911, c. 103, 36 Stat. 913; March 4, 1915, c. 169, 38 Stat. 1192; June 7, 1924, c. 355, 43 Stat. 659 ..... 4, 5, 6, 7, 11, 12, 13, 18, 22, 23, 24, 27
Federal Safety Appliance Acts, 45 U. S. C. §11; Act of April 14, 1910, c. 160, 36 Stat. 298 ..... 4, 7, 9, 11, 12, 18, 22, 24, 27
Title 28, United States Code, §1257(3) 3, 4, 19
Title 28, United States Code, §1651 ..... 4, 19
Federal Rules of Civil Procedure, 54-B 23
Illinois Practice Act, §77 24

RULES OF INTERSTATE COMMERCE COMMISSION

Rule 129, C. F. R. Title 49, Parts 1-91, Sec. 91.129 22
Rule 131, C. F. R. Title 49, Parts 1-91, Sec. 91.139 22

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

NO. 125

WILLIAM EDWARD WOODS, *Petitioner,*

v.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

Your petitioner believes that the interest of justice requires him to reply to respondents' brief in opposition to his petition for writ of certiorari in this cause, and that the interest of clarity and justice warrants the filing of a reply brief.

References (R.) are to the transcript of record on the leave to appeal proceeding, bound in the customary brown binding, except where otherwise indicated by (E. R.) in which instances the references are to the transcript of record, bound in gray, on the writ of error proceeding.

In this way, the misstatements of law and fact and the evasions and omissions contained in respondent's brief, can and will be fully demonstrated, to the end that the iniquitous disregard by the Appellate and Supreme Courts of Illinois of petitioner's statutory and constitutional rights be brought to light, and that the legalistic smoke-screen with which respondent seeks to enshroud and camouflage the gross injustice inflicted upon petitioner, be dispelled.

The petitioner's reply presents with clarity and fullness, the answers to all of the issues impelling this Court to reinvest this petitioner with all his legal and equitable rights that both the congressional laws and the Constitution of the State of Illinois and the United States have bestowed upon him. All of these rights the record patently discloses have been despoiled and destroyed by the Illinois Courts, as a result of which the petitioner has lost wages in the amount of $14,000.00 to date.

The respondent railroad company contends, in fine print, (Resp. Brief in No. 125, pp. 11-12) that even though petitioner will be precluded from recovering under the Federal Boiler Inspection Act on a second trial of this action under the opinion of the Illinois Appellate Court he could, after a foredoomed appeal to the Appellate Court, petition the Supreme Court of Illinois for leave to appeal. If the Supreme Court of Illinois should finally hold that the petitioner was entitled on the evidence already adduced to the instructions which were given with respect to the Boiler Inspection and Safety Appliance Acts, the petitioner could then have a third trial to vindicate his rights subject to further appeals and further delay. What chance would this petitioner have on a second or third appeal to the Supreme Court of Illinois in view of its conduct in refusing to correct the gross injustice which the Appellate Court has inflicted upon petitioner?

It is safe to predict that petitioner's loss of earnings by the time this protracted course of litigation is finally concluded will have doubled or tripled that already sustained,

provided the petitioner can stand the expense of such protracted litigation and lives to see it through. There is no truer axiom in this situation than, "Justice delayed is justice denied."

Respondent in No. 43 does not dispute, but tacitly admits, that the refusal of the Illinois Supreme Court to permit petitioner to file his proffered petition for writ of mandamus has *every attribute of finality* of the highest court of the State to enable this court *to review the ruling of the Illinois Supreme Court* under the provisions of Sec. 1257 (3) of Title 28 of the United States Code. The respondent affirmatively admits (Resp. Brief in No. 43, p. 3) that the mandamus action presented federal questions; however, they contend that this erroneous decision of the Illinois Supreme Court which they studiously and understandably refrain from undertaking to defend on the merits, is sustainable under Illinois law. We assert that under Illinois law this contention is base and fallacious. The reasons are two-fold:

1. The substantive rights and liabilities of the parties are created and defined exclusively by federal law, statutory and constitutional, and must be determined uniformly in all courts throughout the nation, including the courts of the State of Illinois, in accordance with federal decisional law.

2. The local law of Illinois and the rules of Illinois courts relating to and regulating practice and procedure governing appeals and other forms of review do not present the type of non-federal question behind which the glaring errors of the Illinois Appellate and Supreme Courts in the decision of the substantive federal questions in this cause can find immunity from correction by this Court.

Respondent's contention in No. 125 is that the orders of the Illinois Appellate and Supreme Courts are not "final judgments or decrees" within the meaning of 28 U. S. C.

Sec. 1257 and it attempts to brush off the power and jurisdiction conferred on this Court by Section 1651 of Title 28, United States Code, by a dogmatic and unsupported footnote to the effect that that section is not a source of jurisdiction to review state court judgments.

The Court must repudiate respondent's contention; otherwise the desired uniformity which this Court has emphatically said must be applied in all courts, state and federal, for the protection of the injured interstate carrier employees, would fail.

The claim by the respondent that the record does not support petitioner's contentions that the decisions of the Appellate and Supreme Courts of Illinois denies to him the constitutional guaranty of his right to a trial by jury, and of equal protection of the laws and do not nullify his federally created rights provided by the Federal Employers' Liability Act, the Federal Boiler Inspection Act and the Federal Safety Appliance Act, is as baseless as it is false.

Does respondent's counsel believe that this Court will not examine the record, including the proceedings on and the evidence adduced at the trial; likewise the Appellate Court's opinion and the subsequent proceedings, before passing on these applications for certiorari?

Does not the record (R. 55-57; ER. 7-9) contain an admission of guilt, both under the Federal Employers' Liability Act and the Federal Safety Appliance Act, made by counsel and spokesman for the railroad company at the opening of the trial, a year after he had taken petitioner's deposition by which the railroad company and its counsel was fully informed of petitioner's claims as to the inefficiency of the hand-brake on the coal car which permitted it to drift from a safe to an unsafe place after the brake was applied? (R. 56, 84, ER. 8, 36)

Is it not true that petitioner testified that the rear headlight on the tender of the backing locomotive was defective, and looked as if it had been smashed and as if the reflector was off, and that it was out of focus and cast its light up

in the air at an angle of about 45 degrees, leaving the area of 50 to 75 feet immediately behind the backing tender in complete darkness and disabling him from seeing the fouling coal car until it was too late for him to get to a place of safety and to avoid the grievous injuries he sustained when he was caught, crushed, and rolled in the narrow space between the side of the backing tender and the side of the fouling coal car?

Did not the Appellate Court, to which this same counsel again admitted liability in his printed brief and oral argument in open court, state in its opinion that petitioner's testimony as to the defect of the rear headlight created a jury question if the defect of the rear headlight could be made the basis of a violation of the Boiler Inspection Act?

Does counsel expect this Court to subscribe to the proposition that the permanent fixed-focus rear headlight was not a part and an appurtenance of the locomotive and within the scope and command of the Federal Boiler Inspection Act irrespective of the particular use to which the locomotive was being put at the precise moment of injury, and irrespective of the limited requirements of the rules of the Interstate Commerce Commission even under the far too narrow construction which the Appellate Court has ascribed to them?

Does counsel seriously expect this Court to say that a bad back-up or rear headlight permanently affixed to the tender by a fixed-focus method of application to light the way through the darkness of an unlit railroad yard, is better than no light at all and constitutes no violation of the Federal Boiler Inspection Act because it "created" no additional peril, despite the fact that the peril which resulted in petitioner's injury would not have existed if the back-up light had been in proper condition, lighting the area of greatest danger in the immediate vicinity of the backing tender and enabling petitioner to see the fouling coal car in time to avoid injury, notwithstanding the admitted negligence of the railroad company in permitting the coal car to